No. 469. 174.

Brief of Grubb for Respondent

Filed Oct. 11, 1897.

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JAMES H. McKENNEY

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# In United States Supreme Court.

OCTOBER TERM, 1897.

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EX PARTE FRANK H. PIERCE.

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BRIEF AND ARGUMENT OF COUNSEL FOR

TENNESSEE COAL, IRON & RAILROAD COMPANY.

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Petitioner's application for a writ of certiorari is based on two grounds. (Petitioner's brief page 2.) They are: 1. Incompleteness of the transcript of the record of the proceedings in the State Court from which the case was removed. 2. The refusal of the Circuit Court of Appeals for the Fifth Circuit to respect and observe the res judicata of the case established by the decision of the Alabama Supreme Court.

I.

The defect in the transcript from the State Court of which petitioner complains, is the omission from the transcript of the proceedings in the Supreme Court of Alabama.

Petitioner's exact contention is that the Circuit Court and the Circuit Court of Appeals should not have retained jurisdiction of the cause "in the absence of a full record from the State Court, by the fault of the party removing the cause." This being a removal on the ground of local prejudice, there was no requirement imposed by law on defendant to bring into the Federal Court a copy of the record, (Dillon on Removal of Causes, Sec. 52.) Hence if the record was imperfect, it was no fault of defendant's. The record is brought into the Federal Court by a certiorari to the State Court in cases removed on this ground. We submit that the record fails to show that the alleged defect in the transcript from the State Court was ever called to the attention of either the Circuit Court or the Circuit Court of Appeals. It is true that the record (Pages 21-22) does show that a motion to remand the case to the State Court was denied by the Circuit Court. The grounds of this motion, however, do not appear in the record. As a matter of fact, the only grounds relied on in that motion were that the showing of local prejudice was insufficient and that the application came too late. This Court will not presume that the alleged imperfection of the transcript was one of the grounds. The proper remedy to cure such an imperfection in the transcript was by a certiorari to the State Court, after suggestion of diminution of the record, and not by motion to remand the case to the State Court. (Dennis vs Alachua Co., 3 Woods 683-Cook vs Whitney, 3 Woods 715.) No such application was made either in the Circuit Court or the Circuit Court of Appeals, and the record fails to show that any complaint was ever made of this alleged imperfection in the record until the present application was made to this Court. The petitioner sued out a writ of error from the Circuit Court of Appeals. (Record page 64.) In his Assignments of Error, there appears no assignment based on the denial by the Circuit Court of his motion to remand the case to the State Court. (Record pages 65-66.) Whatever may have been

the ground relied on in that motion—whether it was that the showing of local prejudice was insufficient, or that the application to remove came too late after a trial on demurrer, or that the transcript of the State Court was incomplete—and however well founded any one or all of these grounds may have been—the petitioner having voluntarily omitted to ask the Circuit Court of Appeals to review the action of the Circuit Court in denying his motion, by an assignment of error in that Court, cannot in this Court be heard to complain of a ruling which he chose to acquiesce in on his appeal to the Circuit Court of Appeals. He had an ample remedy to correct any error of the Circuit Court on this motion to remand, on his appeal to the Circuit Court of Appeals, by assigning it as error. His voluntary failure to do so, does not entitle him to the extraordinary remedy of the writ of certiorari. For mere incompleteness or defect in the transcript, if such existed, his remedy was to apply to the Circuit Court, after suggesting deminution of the record, for a certiorari to the State Court. This should have been done before trial in the Circuit Court. (Commercial Savings Bank vs. Corbett, 5 Sawy. 172, Dennis vs. Alachua Co., 3 Woods 683, Cook vs. Whitney, 3 Woods 715.) Petitioner elected to go to trial in the Circuit Court without objection to the condition of the record, and to submit the case on appeal to the Circuit Court of Appeals without making any such objections. His first objection is made to this Court in this application for a writ of certiorari to the Circuit Court of Appeals. The granting of this application, and the issuance of a writ of certiorari to the Circuit Court of Appeals, it is very clear could not correct the alleged imperfection in the transcript of the proceedings of the State Court. The Circuit Court of Appeals, in response to the certiorari, could only send up the record in the cause, as it appears in that Court, that is, in its alleged imperfect condition. It could not supply what is alleged to have been omitted from the transcript from the State Court. The State Court alone could supply the matter

alleged to have been omitted from that transcript. Consequently the certiorari for that purpose should be directed to the State Court—not to the Circuit Court of Appeals—and should be issued out of the Circuit Court and not this Court. We do not think that counsel for petitioner seriously contend that an imperfection in the transcript of the proceedings of the State Court, takes away the jurisdiction of the Federal Court to try the case, if jurisdiction otherwise existed. That the Federal Court did acquire jurisdiction appears from the proceedings for removal. (Record pages 5-10.) The petition for removal shows the jurisdictional facts. If the petition for removal was filed too late, that was an objection that could be waived by petitioner. (Gerling vs. B. & O. R. R. Co., 151 U. S., 673; Newman vs. Schwerin, 61 Fed. Rep., 865.) It was waived by the failure to prosecute on appeal, the motion to remand made in the lower Court. (Tod vs. Cleveland & M. V. R. R. Co., 65 Fed. Rep., 145; 12 C. C. A, 521.) Even if the Circuit Court had erred on a jurisdictional question, the remedy provided for reviewing such error by the Act of Congress creating the Circuit Court of Appeals, is by appeal to the Circuit Court of Appeals, or directly to the Supreme Court, not by certiorari. While the Act of Congress confers unlimited authority on this Court to remove by certiorari from the Circuit Court of Appeals all cases there pending in which a final judgment has been or may be rendered, this Court has imposed definite restrictions on the exercise of this right, and has granted the writ only in cases of public gravity or importance, or where there is a difference of opinion between the different Circuit Courts of Appeal on similar questions, or where there is a difference of opinion, which will result in a conflict of jurisdiction between a Circuit Court of Appeals and a State Court of last resort. We submit that the first ground on which the present application is made, viz:—that the Circuit Court of Appeals retained the case in its jurisdiction, the transcript of the proceedings in the State Court being incom-

plete, finds no semblance of support from any of the grounds for granting the writ laid down by this Court. The purpose of the writ of certiorari provided by the Act creating the Circuit Court of Appeals, is to have the case certified to this Court for review on the record, as it appears in the Circuit Court of Appeals. Petitioner however seeks to pervert its purpose to that of a mere remedial writ for the perfecting of an imperfect record—a writ of certiorari to correct a diminution in the record. We further submit that the transcript from the State Court, is not, in fact, incomplete. The Clerk of the Circuit Court of Jefferson County could not in the nature of things certify as part of the record of his Court, proceedings that were had in the Supreme Court of Alabama. It is not charged that he omitted from his transcript any of the proceedings had in his own Court. However incomplete the record of such proceedings may be, the petitioner, after electing to go to trial without objection on that ground, both in the Circuit Court and the Circuit Court of Appeals, cannot now be heard to question its sufficiency.

II.

It is contended that the writ of certiorari should issue because the Circuit Court of Appeals refused "to respect and observe the res judicata of the case established by the decision of the State Supreme Court." We understand that, by this, counsel for petitioner mean to rely for ground of certiorari on the existence of a conflict between a Court of Appeals and the Courts of a State. This Court has never held that a decision of a Circuit Court of Appeals involving merely a question of res adjudicata, whether that res adjudicata is based on the decision of a State Court or not, is any ground for the granting of the writ applied for. It has held that where a Circuit Court of Appeals decides a question differently from a State Court of last resort, and where that decision will or may result in a conflict of

authority between the Federal and State Courts, there exists a proper case for the granting of the writ, and this though no question of res adjudicata arises. The decisions in conflict may have been rendered in cases between different parties, yet if the enforcement of the Federal decision is likely to lead to a conflict of authority, this Court will grant the writ, though no question of res adjudicata could arise. So we submit that a mere question of res adjudicata arising on a former decision of a State Court, where no danger of conflict between jurisdictions is to be apprehended as a result of such decision, furnishes no ground for the granting of the writ of certiorari under the qualifications laid down by this Court. The vital and determining fact is not the mere difference of opinion between Courts, but that as a result of such difference of opinion, conflict between jurisdictions may arise. Mere difference of opinion between State and Federal Courts is harmless. On questions of general commercial law, the Federal Courts reserve to themselves the right to determine differently from the State Courts, and only respect state decisions for what they are logically worth. Surely it will not be contended that on such questions and where there can be no apprehension of a conflict of jurisdiction arising out of the enforcement of the Federal decision, a mere difference of opinion between State and Federal Courts will justify the issue of the writ. The result of such an unqualified rule would be that the writ would issue to review a decision of a Circuit Court of Appeals on a question of commercial law, which followed a previous decision of this Court on the same question, but antagonized that of a State Court of last resort. In the case of Forsyth vs. City of Hammond, 166 U. S., cited by counsel for petitioner, the rule and its qualifications are manifest. The question there involved was one of purely local law—the construction of a State Statute and Constitution. The opinion of the State Court of last resort would be followed by this Court on such a question, as binding. The result of a different decision by the Federal

Court from the State Court of last resort in that case, when its enforcement was attempted, would have been to put the Federal authorities in imminent conflict with the State authorities. This apprehended and unseemly conflict of jurisdictions, together with the local character of the question in controversy, justified the issuance of the writ. The distinction between that case and the case at bar is obvious. The question involved in this case is the construction of a mere private contract—a question of general commercial law—without public interest—not dependent on the construction of any State statute or constitution—the decision of which would violate no established rule of property and the enforcement of which could not possibly cause a conflict of jurisdiction. In the case of Forsyth vs. City of Hammond, supra, the State Courts were still insisting on the validity of their decision that the territory in controversy had been legally annexed to and was a part of the City of Hammond, and it was the attempt of the municipal authorities of the City of Hammond to tax such property that led to the injunction proceedings in the Federal Courts. The prosecution of such injunction proceedings had an inevitable tendency to array the State and Federal authorities in conflict. No such result would follow from the decision of the Circuit Court of Appeals in the case at bar. From it no possible conflict of jurisdiction can arise. The State Courts upon removal of the case parted with all jurisdiction of it. No process from any State Court can issue that will conflict with process issued from the Federal Courts to enforce its judgment. The question decided has no significance beyond the particular case at bar. It is obvious that there is no possible chance of any conflict of authority or jurisdiction to be apprehended from the enforcement of the judgment of the Federal Court in this case. Not more so than if the case had originally been instituted in the Federal Court. Unless this Court is prepared to hold that the existence of mere difference of opinion upon a question which the Federal Courts reserve the right to determine

independently of the State Courts, where there is no danger of conflict to be apprehended from the enforcement of such decision, affords ground for the issuance of the writ of certiorari, we submit that the petition fails to make out a case, conceding that such difference of opinion exists.

An examination of the record will show, however, that the Supreme Court of Alabama, does not differ in its construction of the contract sued on from the Circuit Court of Appeals, because the Supreme Court of Alabama never construed the contract, which the Court of Appeals had presented to it. The case was appealed to the Supreme Court of Alabama from a ruling of the lower court on demurrer to the complaint. The written contract was set out in the complaint but set out incorrectly. The Supreme Court of Alabama only construed the contract as it was incorrectly copied in the complaint. The petitioner after the case was removed to the Federal Court corrected the written contract by amending his complaint. The amendment appears in the record (pages 25-26). The contract, as it appeared before amendment, in the record (pages 13-14). Petitioner contends that the amendment did not change the legal effect of the written contract, because the omitted portion, inserted by amendment into the contract, was in a recital of a former parol contract on the same subject matter between the same parties, and not in the "contracting" part of the written contract. The contract sued on was a contract of hiring, and its duration was the doubtful point upon which construction was sought. Petitioner contended that it was to last during disability and not from month to month. Two former contracts between the same parties on the same subject matter had been entered into, and their terms were recited in the written contract sued on. The first of these contracts by its express terms was to last while petitioner was disabled. The second and the written contract sued on made no mention of the duration of the term of employment. The contention of petitioner was that a proper construction of the written

contract showed that it was a mere modification of the first verbal contract recited in it, and that for this reason the period of duration in the first agreement should be imported into the third, or written contract, by implication, making it one to last during the disability of petitioner. The defendant on the other hand contended that the third contract was an independent, separate contract from the first, but conceded that the third or written contract was a mere modification of the second. On this question of construction, was the omission of the clause, inserted into the contract sued by amendment, material? It is clear that it was. Before the amendment, by the terms of the second contract, the petitioner was entitled to $60.00 a month and free house rent. He had no option to insist on commissary supplies in lieu of house rent—had no right to supplies at all. The third or written contract —that sued upon—recites that the parties agreed that it would be better for petitioner to have house rent than supplies of equal amount, and modified the previous agreement by taking away his option to demand supplies instead of house rent. As before the amendment was made, petitioner's only right to supplies, as appeared from contract then sued on, was found in the first contract recited, it was necessary to refer back from the third contract to the first, in order to account for the obligation in the third on the part of defendant to allow petitioner supplies from its commissary. Under this incorrect statement of the contract, the Supreme Court of Alabama may have been right in construing the contract to be one for the disability of petitioner, on the theory that the third and written contract—the one sued on—was necessarily a mere modification of the first, because its terms were unintelligible unless referred back to the first. The amendment made by the petitioner after the removal of the case, did away with any necessity for looking back to the first contract recited in order to make the written contract sued on intelligible. As we have stated the second contract before amendment provided

that petitioner should be allowed only house rent and $60.00 a month wages—it provided for no supplies in lieu of house rent. The amendment was as follows: "or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent." These words were inserted by the amendment in the written contract sued on, immediately after the words "$60.00 a month and in addition free house rent," appearing in the recitals of the terms of the second contract. The amendment made it apparent that the reference in the third and written contract—that sued upon—to "supplies of about equal amonnt from the commissary" was to the second contract, of which defendant conceded the written contract was a modification —and not to the first contract, of which defendant denied the written contract sued on was in anywise a modification. The proper construction of the contract sued on is not a matter for the consideration of this Court on this application. The issue now is, was the clause inserted in the written contract—that sued on—by amendment, after the case had been reversed by the Supreme Court of Alabama, material in its construction. That it has a material bearing in determining whether the written contract is a separate, independent contract from the one first recited in it, is evident, and this was the vital question considered by the Court in determining whether the written contract was for any certain duration, since it was conceded that no duration was expressly mentioned in it, except as such duration could be arrived at by looking to the first contract, recited therein. We submit that, as a matter of fact, the Supreme Court of Alabama has never decided what the proper construction of the corrected contract was, since that contract was never submitted to it. There can therefore be no conflict of opinion between that Court and the Circuit Court of Appeals for the Fifth Circuit, since it construed another and a different contract, in fact and in legal effect.

It is our opinion that whether the Circuit Court of Ap-

peals rightly or wrongly determined the question of re adjudicata, is not a material question on this application. It is not the failure of the Circuit Court of Appeals "to respect or observe the res judicata of the case established by the decision of the State Supreme Court," that authorises this Court under its decisions to grant the application. It is difference of opinion between the Federal and State Courts, likely to result in conflict of jurisdiction, that this Court has said is a ground for issuing the writ, and not the mere correctness vel non of the lower Court's decision on a question of res adjudicata. The decision of the Court of Appeals on this question was, however, correct. In the first place, the record failed to show any decision of the Supreme Court of Alabama. Again if the decision of the Supreme Court be considered though not set out in the record, it is apparent from the record that its decision was based on another and different contract from that presented to the Court of Appeals. The subject matter of the two decisions being different, no res adjudicata arises. Again the decision of the Supreme Court was on as mere interlocutory appeal from a ruling on demurrer, and its judgment was a mere reversal and remanding of the case for a new trial, and not such as to create res adjudicata between the parties. (Bucher vs. Cheshire R. R. Co., 125 U. S., 555.) Again by express provision of the Statute of Alabama (Code of Alabama, Sec. 683 A.) which has been in force since February, 1887, the opinion of that Court on a former appeal in the same case is not binding on it upon subsequent appeal, but it is required to decide the question as the law then appears to it. No case cited by counsel for petitioner on this question goes to the extent of holding that the decision of the State Court of last resort on appeal is binding on this Court on appeal after removal to the Federal Court, unless the State Court's decision would be binding on itself on a subsequent appeal. Under the Statute of Alabama, the decision of the Supreme Court of Alabama, when this case was before it on appeal

from the ruling of the lower Court on demurrer, would not be binding on it when the case came before it again on a subsequent appeal. No more would it be binding on this Court after removal. After removal the decision of the State Court is of equal but not greater obligatory force in this Court than it was in the State Court before removal. If it was binding on the State Court on a subsequent appeal, we are prepared to concede that it would be binding on this Court, or the Circuit Court of Appeals. As it is not binding on the Supreme Court of Alabama on a subsequent appeal. no more is it binding on this Court or on the Circuit Court of Appeals. The Statute takes away from the decision of the State Supreme Court the quality of res adjudicata. After remandment, the parties are not estopped either in the lower Court or in the Supreme Court again to litigate the same question. It would be the duty of the lower Court to follow the former decision of the Supreme Court of the State, not because the decision was res adjudicata as between the parties, but because the decision of a court of last resort, until reversed, is the law of the land, whether rendered in a case between the same or different parties. This relation does not hold good between a State and Federal Court on a question of general or commercial law. The question of res adjudicata, however, does not give the decision its binding force even on the lower court. So when the case comes by removal to the Federal Court, the decision, which was not res adjudicata as between the parties in the State Court, does not acquire that quality by removal. The decision has the same effect in the Federal Court that it did in the State Court. The Circuit Court of Appeals stood in the same position, exactly, as the Supreme Court of Alabama, and had the right to decide the question as the law then appeared to it, and without reference to the former decision of the State Supreme Court of Alabama. In the case of Northern Pacific Railroad Co. vs. Ellis, 143 U. S., 458, this Court in the second paragraph of the syllabus, say :—"In Wisconsin, the

decision of the State Supreme Court upon a demurrer is conclusive upon the questions legitimately involved, and is res adjudicata, and such Court has no power upon a second appeal of the same case to review that judgment nor can this Court do so." It is very clear that the binding force of the decision of the State Court on this Court is limited to cases where that decision is binding on the State Court itself on a subsequent appeal. In the case at bar, the decision of the State Court is by statute declared not to be binding on the State Court on a second appeal. For this reason the doctrine of res adjudicata invoked by petitioner has no application. Counsel for petitioner has cited no case where the decision of the State Court was held to be binding on this Court, unless it was also binding on the State Court. Section 683 A. of the Code of 1886 of Alabama, is as follows:

"The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what in its opinion at that time, is law, without any regard to such former ruling of the law by it; but the right of third persons, acquired on the faith of the former ruling shall not be defeated or interfered with by or on account of any subsequent ruling."

We respectfully submit that petitioner has made no case for the issuance of the writ of certiorari, and that his petition should be dismissed at his costs.

Respectfully submitted,

WALKER PERCY

and WILLIAM I. GRUBB,

Attorneys for Tennessee Coal, Iron & Railroad Co.

# In Supreme Court of the United States

**October Term 1898.**

**No. 174.**

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THE TENNESSEE COAL, IRON & RAILROAD CO.
Plaintiff-in-Error.

vs.

FRANK H. PIERCE, Defendant-in-Error.

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*On Writ of Certiorari to the United States Circuit Court of of Appeals for the Fifth Circuit.*

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ARGUMENT FOR TENNESSEE COAL, IRON & RAILROAD COMPANY ON ITS WRIT OF ERROR AND ON THE WRIT OF ERROR OF F. H. PIERCE.

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## STATEMENT OF CASE.

This was an action for the breach of a contract of employment, by the terms of which the defendant-in-error was employed by the plaintiff-in-error, the consideration of the employment over and above the work agreed to be done, being the release of a cause of action for an injury suffered by the defendant-in-error, while in the employment of plaintiff-in-error. The facts are largely undisputed. The

defendant-in-error was injured in a coal mine of the plaintiff-in-error in May, 1888. In November, 1888, and before the defendant-in-error was so far recovered as to be able to work, the parties to this suit had a verbal understanding by which the plaintiff-in-error agreed to give the defendant-in-error such supplies from its commissary as he might choose to take, pay him regular wages while disabled, and give him coal, wood and the benefit of the convict garden. This verbal agreement is recited in the written contract sued on. (Record Pages 31-2-3.) In May, 1889, after the defendant-in-error had resumed work a new contract was made between the parties by which the defendant-in-error was to be given such work as he could do, and to be paid therefor sixty dollars a month, and in addition free house rent, or in lieu of house rent a certain amount of supplies from the commissary of plaintiff-in-error, equal to the amount of house rent. This agreement was verbal and is recited in the original contract sued on (Record Pages 31-2-3.) This contract also recites that each of these propositions had been carried out before the written contract sued on was entered into. In June, 1890, a written contract was entered into between the parties by the terms of which it was agreed that the defendant-in-error should have the house rent instead of any supplies from the commissary, making his wages sixty dollars a month, and in addition to house rent, free coal and wood and the same benefit of the convict garden, as was allowed to others having that privilege, and in return the defendant-in-error agreed to release his cause of action against plaintiff-in-error for his injury and to do such work as he was able. This agreement appears in full with its recitals already referred to in the bill of exceptions of plaintiff-in-error. (Record Pages 31-2-3.) The facts showed that the defendant-in-error after the making of this contract, entered upon his employment with plaintiff-in-error thereunder, and continued under such employment, operating a stationary engine, which ran an air compressor at a coal mine for

over a year. That in May, 1891, the defendant-in-error ceased to work for plaintiff-in-error under the following circumstances: The plaintiff-in-error employed a convict named Dunn to run the compressor engine at night, which defendant-in-error ran in the day time. Dunn and the defendant-in-error had a misunderstanding about the work they were engaged on, the details of which, as testified to by defendant-in-error, appear in the bill of exceptions of plaintiff-in-error. (Pages 37-8.) Defendant-in-error, after this, went to his superior in the service and notified him that he would not work with Dunn, without assigning any reason therefor and went home, leaving the engine without any one to run it. The reason assigned by him for refusing to work with Dunn, *on the trial of the cause*, was that Dunn was a dangerous man and he was afraid of him. It was undisputed, however, that he did not assign any such reason or any reason, at the time he quit work. After the lapse of a period, varying according to different witnesses, from one to three days, plaintiff-in-error returned to his place of work and offered to go back to work, but without agreeing to work with Dunn, but the agent of plaintiff-in-error told him he had already put a man in his place and would not put him back. After this the letters which appear in the bill of exceptions of plaintiff-in-error (Record Pages 39-40), passed between the parties, and defendant-in-error did no more work for the plaintiff-in-error. The suit is instituted for the alleged breach of this written contract of employment, the alleged breach consisting in the refusal to allow the defendant-in-error to go back to work after he had quit work under the circumstances detailed, and in refusing to pay him the compensation provided for by the contract.

The principal questions presented by the writ of error are four:

First—Was the written contract sued on, a contract whose term was the disability of the defendant-in-error in the sense that if his injury was permanent, the contract

extended during his life, or was it a mere contract of hiring from month to month or at will.

Second—Has this question become res adjudicata by reason of the decision of the Supreme Court of Alabama.

Third—Did the refusal of the defendant-in-error to continue work at the compressor engine, to which he had been assigned under his contract, because of his disinclination to work with Dunn, justify the plaintiff-in-error in refusing to proceed with the contract.

Fourth—If entitled to recover at all, was the defendant-in-error entitled to recover damages beyond the time of trial, and what was the proper measure of damage, to which he was entitled.

The first and second questions are raised by the assignment of error to the Court's action in overruling plaintiff-in-error's demurrer to the complaint as amended (Assignment 1½) to the Court's action in giving the written charge requested by the defendant-in-error (Assignment 16) to the Court's action in overruling plaintiff-in-error's objection to the testimony as to the extent of defendant-in-error's injuries. (Assignment 3.)

The third question is raised by the assignment of error to the Court's action in sustaining defendant-in-error's demurrer to plaintiff-in-error's second plea, and in refusing the second and third written charges requested by the plaintiff-in-error. (Assignments 1-18-19.) Also Assignments numbered 7, 8 and 9, relating to the Court's action in admitting testimony as to the character of the convict Dunn, the threats made by him towards defendant-in-error and defendant-in-error's reason for refusing to work with him.

The fourth question is raised by the assignments of error predicated on the action of the Court below in giving the written charge requested by defendant-in-error (Assignment 16) and in refusing the sixth and seventh written charges requested by plaintiff-in-error. (Assignments 22-23).

The contract sued on appears on its face to have been executed by G. B. McCormack and defendant-in-error, and the sufficiency of this method of execution to bind plaintiff-in-error is raised by the second assignment of error, based on the Court's action in admitting the contract in evidence.

The 4, 5, 13 and 14th assignments of error are predicated on the Court's refusal to allow proof of the two verbal agreements mentioned in the recitals of the contract sued on.

## ASSIGNMENTS OF ERROR RELIED ON.

1. The Court erred in sustaining plaintiff's demurrer to the second plea of defendant.

1½. The Court erred in overruling the defendant's demurrer to the plaintiff's complaint as amended.

2. The Court erred in overruling defendant's objection to the introduction of the written contract sued on in this case in evidence.

3. The Court erred in overruling the objection of defendant to the following question: "State what were the extent of your injuries so received?" propounded by plaintiff's counsel to the plaintiff himself. The answer to the question was: "My left hand was crushed, and the little finger cut off. I can only bend my left hand now partially at the fingers. It was a good hand before I was hurt. My leg was broken at the ankle, and a piece of bone two and a half inches long taken out, and that made one leg shorter than the other, as it still is. My injured leg pains me now when I stand on it any length of time down in the ankle. I can only partially bend my foot."

4. The Court erred in sustaining plaintiff's objection to the following question propounded to plaintiff by defendant's counsel, viz: "State the conversation and agreement made and had between you and Mr. McCormack with reference to what the company would do for you when the first agreement was made in November, 1888."

5. The Court erred in sustaining plaintiff's objection to the following question, propounded to plaintiff by defendant's counsel, viz: "State what the agreement between you and Mr. McCormack was which was made in May, 1889."

7. The Court erred in overruling defendant's objection to the following question propounded by plaintiff's counsel to plaintiff himself, viz: "What was Dunn's character for peace and quiet?" The answer to the question was: "When he was in liquor he was bad, and when he didn't have liquor he was all right."

8. The Court erred in overruling defendant's objection to the following question, propounded to the plaintiff by his counsel, viz: "Did Dunn make any threats in talking to you?" The answer was: "He told me to get out at once and started towards me. I had picked up a lantern and asked him how it had got there, and he said, 'it is none of your damn business; you get out of here and keep out or I'll kick you out,' and he started toward me, and I went out and aint been back since."

9. The Court erred in overruling the defendant's objection to the following question, propounded to plaintiff by his counsel, viz: "Did you refuse to work with him on account of your personal danger?" The answer was: "I did."

13. The Court erred in sustaining plaintiff's objection to the following question, asked by defendant's counsel, of the witness McCormack, viz: "In November, 1888, when you first agreed to pay plaintiff's wages while he was disabled, state whether or not he made any agreement to release his cause of action for injury received against the company."

14. The Court erred in sustaining plaintiff's objection to the following question, asked by defendant's counsel, of witness McCormack, viz: "Do you remember plaintiff's being paid a lump sum of several hundred dollars before he

started to work, after he was hurt, if so, state the circumstances as well as you can."

16. The Court erred in giving to the jury at plaintiff's request, the following written charge: "Under the evidence in this case, I charge you that the plaintiff is entitled to recover in this action, and the measure of his damage is the aggregate amount of all the installments of seventy dollars for each month in default and unpaid from the time of the commencement of the employment under the contract sued on until the time of the trial, with interest on each installment from the time it fell due up to the time of the trial, which amounts under the evidence to the sum of $5,893.00."

17. The Court erred in refusing to give to the jury at the request of the defendant the following written charge, numbered one: "If the jury believe the evidence in this case, they must find a verdict for the defendant."

18. The Court erred in refusing to give to the jury at defendant's request the second written charge, viz: "If the jury believe the evidence in this case, they must find that the plaintiff left the defendant's service wrongfully and without legal excuse."

19. The Court erred in refusing to give to the jury at defendant's request the third charge in writing, viz: "If the jury believe from the evidence that the plaintiff left the service of the defendant wrongfully and without legal excuse, then the jury must find for the defendant."

22. The Court erred in refusing to give at defendant's request the sixth written charge: "If the jury believe from the evidence that the plaintiff wrongfully left the service of the defendant, then the jury must find for the defendant under its plea of recoupment and assess such damages as the jury may believe from the evidence the defendant may have sustained from the loss of plaintiff's services during the term of the contract."

23. The Court erred in refusing to give at defendant's request the seventh written charge, viz: The value of the benefit which the jury may believe from the evidence, the defendant would have derived from the continued performance of the work, which plaintiff was required to do under the contract, during the term of the contract, is to be deducted from the amount, the jury may believe from the evidence the plaintiff would have earned under the contract during its term, had it not been terminated, when the jury come to assess the damages.

24. The Court erred in refusing to give to the jury at defendant's request the eighth written charge, viz: If the jury believe from the evidence in this case that Pierce, at the time he was discharged by defendant was no longer disabled within the contemplation of the contract sued upon. then the jury must find a verdict for the defendant.

## PROPOSITIONS OF LAW AND FACT.

### I.

The contract sued on was for an indefinite time and terminable at the will of either party thereto.

In this country, the rule is general that a hiring at a certain rate per day, month or year, merely fixes the rate of wages and does not fix any definite time for the employment.

At most the duration of the employment is fixed by the period of estimating the wages.

"A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages." 14 Am. & Eng. Encyc. Law, page 762.

"With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day,

week, month or year, no time being specified, is an indefinite hiring, and no presumption attached that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants." Wood Master Servant, Sec. 136, Page 283-4.

Franklin Co. vs. Harris, 24 Mich. 115.
Parsons on Contracts, 519.
Howard vs. E. T. V. & G. R. R. Co., 91 Ala. 270.
Clark vs. Ryan, 95 Ala. 409.
De Briar vs. Minturn, 1 Cal. 450.
Tatterson vs. Suffold Mfg. Co., 106 Mass. 56.

The contract sued on stipulates no definite time of employment. Its language is: "Now therefore it is agreed that in view of the above propositions, *which have been faithfully carried out*, that my wages from this date are to be $65 per month, etc." How many months this employment is to last is nowhere stated. Nor is there any intimation in any part of the written contract itself from which any definite duration to the employment could be inferred. Without reference to the former contracts recited therein, there is to be found nothing to fix the duration of the employment. The case has been to the Supreme Court of Alabama, that Court, however, has never construed the identical contract here sued on, as is hereinafter shown. The opinion of the Supreme Court of Alabama, so far as it relates to this proposition is as follows: "As to the first proposition our opinion is, without entering into any discussion of the reasons which support it, that the contract is sufficiently definite as to time, and bound the defendant

to its performance so long as plaintiff *should be disabled by reason of the injuries which he received*, which under the averment that he was permanently disabled, will be for his life." We submit that the admitted failure of the Court to enter into any discussion of the reasons for their opinion, deprives that opinion of very much of the weight it would otherwise have. A mere statement of its conclusion that the contract was to last during the disability of the defendant-in-error, is unconvincing and unsatisfactory. The Court will observe that there is no mention of the plaintiff's disability in the contracting part of the agreement sued on. Nor is there any mention of such disability in the recital of the second contract made between the parties. The only mention of it occurs in the recital of the first verbal contract made in November, 1888. Unless the contract sued on was a mere modification of the first verbal contract, it is clear that the mention of the period of defendant-in-error's disability in the first contract can have no influence on the last and litigated contract. The important inquiry then is: "Is the first verbal contract made in 1888 the basis of the written contract sued on in such sense that the written contract is a mere modification of it? The defendant-in-error was injured in May, 1888, and in November, 1888, while he was still disabled from work because of his injuries, he entered into a contract with plaintiff-in-error by parol by the terms of which, the plaintiff-in-error was to "pay me regular wages while I was disabled," etc. This contract is recited in the written contract sued on, and this is the only mention of "disability" as the period of the contract. The written contract further recites that "said proposition was accepted by me and *carried out by the said company*," and that, "in May, 1889, *after I had resumed work*, a further proposition was made *to give me work such as I could do*, paying me therefor the wages paid me before said accident, etc." In this second verbal agreement, there is no mention that the agreement was to continue during the disability of the defendant-in-

error. The first verbal agreement was made while the defendant-in-error was still not recovered from his injuries so that he could work, and was not a contract for work or that required work of him. It did not contemplate that defendant-in-error was to be paid any wages in the sense that they were to compensate him for the labor to be performed. It was simply an agreement to continue his wages, regardless of his capacity to work, or in view of his incapacity to work, and for that reason, until his disability to labor ceased. No release of his cause of action for his injuries is stipulated for so far as the recital shows. On its face, it appears to have been a mere gratuitous unenforceable agreement to continue to pay defendant-in-error his time so long as he was unable to work. Such agreements without other or further consideration than the moral duty to support a helpless servant, who has been injured in the service of the master, are not uncommon. The duration of it, manifestly in the contemplation of the parties, was the duration of the cause that provoked it, i. e., the inability of the defendant-in-error to make his own living because he had not recovered from his injuries. The gist of the agreement and the provoking cause of it, was that inability to work, and the consequent impossibility of defendant-in-error's taking care of himself. "Pay me regular wages while I was disabled" evidently means to pay me while I was doing nothing by reason of my injuries, the same wages I got while I was working, before I was injured. Taken in this sense, "while I was disabled" must mean while I was unable to work. This is a very different sense from that sought to be injected into it by counsel for defendant-in-error, i. e., the equivalent of permanent injury. A man who loses his little finger by an accident may be disabled for a week or more from work, and his employer might be willing to continue his wages while thus disabled. When he returned to work, his disability would cease, but his injury would be permanent. Under a promise on the part of the master to pay such a person wages while dis-

abled, would any one contend that the master, the promise being otherwise enforceable, could be compelled to pay his wages for life, because his injury was permanent. His injury, it is true, was permanent, but his disability was temporary. So with the defendant-in-error, his injury may have been permanent, his disability however ceased when he resumed work. The parties themselves give the strongest possible practical construction of this use of the word by their subsequent conduct. In May, 1889, when the written contract recites that the defendant-in-error had resumed work, and the first agreement had been carried out, they mutually feel it necessary to make a new agreement. What change of facts is there in the situation of the parties that makes this new contract a necessity? The only change is that the defendant-in-error had "resumed work." And the parties characterize the new agreement as "a further proposition made *to give me work*." As soon as defendant-in-error was able to resume work, the parties at once enter into a new agreement to give him work. They recognize by this both that the first contract was not a contract for work and that it was a contract to last only while no work was possible. When work on the part of defendant-in-error first became possible, they mutually enter into an agreement to provide for the terms of the service. In this agreement there is not a word said of its continuing during the disability of the defendant-in-error. The parties thus recognized that the disability had ceased, and for this reason, had no place in a contract which was to provide for work. Yet the Supreme Court of Alabama would import by implication into this second contract the words "while he was disabled" from the first contract, in spite of the recitals that the first contract had been carried out, in other words, that the disability had ceased before the second contract was entered into, and that the second contract was made after defendant-in-error had resumed work. These words could not be imported rationally into the second agreement, unless with the meaning of "permanent injury" for the second

agreement itself was based on the idea of defendant-in-error's restored ability to work. That these words did not have this meaning in this first agreement we have shown. By what rule of construction, can they be imported into the second agreement with a changed meaning. These two agreements were not of the same class, one alone was for the performance of work. Each was complete in itself without aid from the other. There is no reason for any inference that any of the terms of the first were continued by implication into the second. The third agreement, which is the one sued on, purports on its face to be a mere modification of the second, and we concede that if the second was to last during the plaintiff's disability, the third, with some show of reason, might be held to do so also. The third does not recite that the second had been carried out (that is "completed") but that it has been "*kept* by both parties," (that is, "observed by both parties,") and in view of that fact and the mutual opinion that it was better for the defendant-in-error to have house rent than supplies, the modification is made. It is confessedly on its face a modification, and is radically different in this respect from the second agreement, which clearly appears to be a new contract on a new subject matter from the first agreement. In the third agreement, like the second, there is no word or intimation that the contract was to last during the disability of defendant-in-error, for the very obvious reason that at the time it was entered into, the parties regarded defendant-in-error's disability as having come to an end by his resumption of work. This agreement was made in June, 1890, and unless the words: "while I was disabled," which appear only in the first agreement made in November, 1888, are read from that agreement through the second agreement into the written contract sued on, there is admittedly nothing in this written contract sued on, to take it out of the general rule laid down by the authorities that a general or indefinite hiring, one in which the rate alone can be referred to in fixing the

duration, is terminable at the will of the parties thereto. We submit that the first contract not being a contract for work and labor is essentially of a different character from the second, which is a contract for work and labor, and therefore the second cannot be a mere modification of the first. We submit further that if the words "while I was disabled," could in any event be imported into the second contract from the first, they could only be so imported with the same meaning that they were given in the first contract "disability to work and labor."

Importing these words into the second agreement with this meaning, they become manifestly out of place, since this second agreement recites that it was not made until after defendant-in-error had resumed work, and provided by its terms for the performance of work by defendant-in-error.

This question is presented by assignment of error, numbered 1½ (Record Page 51) predicated on the overruling of plaintiff-in-error's demurrer to the complaint as amended; by the third assignment of error; by the sixteenth and seventeenth assignments of error, predicated on the general affirmative charges, given at defendant-in-error's request and refused at plaintiff-in-error's request.

## II.

It is contended that the construction of this contract has become res adjudicata as between the parties to this suit by the decision of Supreme Court of Alabama on appeal from a ruling on demurrer. We submit the record fails to show that there is any res adjudicata.

*a.* It fails to show any decision of the Supreme Court of Alabama in the case. This is admitted.

*b.* If this Court goes beyond the record it is clear after examination of the Court's opinion that the Supreme Court of Alabama, does not differ in its construction of the contract sued on from the Circuit Court of Appeals, because

the Supreme Court of Alabama never construed the contract, which the Court of Appeals had presented to it. The case was appealed to the Supreme Court of Alabama from a ruling of the lower Court on demurrer to the complaint. The written contract was set out in the complaint but set out incorrectly. The Supreme Court of Alabama only construed the contract as it was incorrectly copied in the complaint. The petitioner after the case was removed to the Federal Court corrected the written contract by amending his complaint. The amendment appears in the the record (pages 25-26.); the contract, as it appeared before amendment, in the record (pages 13-14.) Petitioner contends that the amendment did not change the legal effect of the written contract, because the omitted portion, inserted by amendment into the contract, was in a recital of a former parol contract on the same subject matter between the same parties, and not in the "contracting" part of the written contract. The contract sued on was a contract of hiring, and its duration was the doubtful point upon which construction was sought. Petitioner contended that it was to last during disability and not from month to month. Two former contracts between the same parties on the same subject matter had been entered into, and their terms were recited in the written contract sued on. The first of these contracts by its express terms was to last while petitioner was disabled. The second and the written contract sued on made no mention of the duration of the term of employment. The contention of petitioner was that a proper construction of the written contract showed that it was a mere modification of the first verbal contract recited in it, and that for this reason the period of duration in the first agreement should be imported into the third, or written contract, by implication, making it one to last during the disability of petitioner. The defendant on the other hand contended that the third contract was an independent, separate contract from the first, but conceded that the third or written contract was a mere modification of the

second. On this question of construction, was the omission of the clause, inserted into the contract sued on by amendment, material? It is clear that it was. Before the amendment, by the terms of the second contract, the petitioner was entitled to $60.00 a month and free house rent. He had no option to insist on commissary supplies in lieu of house rent —had no right to supplies at all. The third or written contract—that sued upon—recites that the parties agreed that it would be better for petitioner to have house rent than supplies of equal amount, and modified the previous agreement by taking away his option to demand supplies instead of house rent. As before the amendment was made, petitioner's only right to supplies, as appeared from the contract then sued on, was found in the first contract recited, it was necessary to refer back from the third contract to the first, in order to account for the obligation mentioned in the third on the part of defendant to allow petitioner supplies from its commissary. Under this incorrect statement of the contract, the Supreme Court of Alabama may have been right in construing the contract to be one for the disability of petitioner, on the theory that the third and written contract—the one sued on—was necessarily a mere modification of the first, because its terms were unintelligible unless referred back to the first. The amendment made by the petitioner after the removal of the case, did away with any necessity for looking back to the first contract recited in order to make the written contract sued on intelligible. As we have stated the second contract before amendment provided that petitioner should be allowed only house rent and $60.00 a month wages—it provided for no supplies in lieu of house rent. The amendment was as follows: "or in lieu of house rent, a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid me for house rent." These words were inserted by the amendment in the written contract sued on, immediately after the words "$60.00 a month and in addition free house rent," appearing in the recitals of the terms

of the second contract. The amendment made it apparent that the reference in the third and written contract—that sued upon—to "supplies of about equal amount from the commissary" was to the second contract, of which plaintiff-in-error conceded the written contract was a modification—and not to the first contract, of which plaintiff-in-error denied the written contract sued on was in anywise a modifition. The issue is, was the clause inserted in the written contract—that sued on—by amendment, after the case had been reversed by the Supreme Court of Alabama, material in its construction. That it has a material bearing in determining whether the written contract is a separate, independent contract from the one first recited in it, is evident, and this was the vital question considered by the Court in determining whether the written contract was for any certain duration, since it was conceded that no duration was expressly mentioned in it, except as such duration could be arrived at by looking to the first contract, recited therein. We submit that, as a matter of fact, the Supreme Court of Alabama has never decided what the proper construction of the corrected contract was, since that contract was never submitted to it.

*c.* Again the decision of the Supreme Court was on a mere interlocutory appeal from a ruling on demurrer, and its judgment was a mere reversal and remanding of the case for a new trial, and not such as to create res adjudicata between the parties.

Bucher vs. Cheshire R. R. Co., 125 U. S., 555.
Gardner vs. Michigan Cen. R. R. 150 U. S. 349.

*d.* Again by express provision of the Statute of Alabama (Code of Alabama, Sec. 683 A.) which has been in force since February, 1887, the opinion of that Court on a former appeal in the same case is not binding on it upon subsequent appeal, but it is required to decide the question as the law then appears to it. No case cited by counsel

for petitioner on this question goes to the extent of holding that the decision of the State Court of last resort on appeal is binding on this Court on appeal after removal to the Federal Court, unless the State Court's decision would be binding on itself on a subsequent appeal. Under the Statute of Alabama, the decision of the Supreme Court of Alabama, when this case was before it on appeal from the ruling of the lower Court on demurrer, would not be binding on it when the case came before it again on a subsequent appeal. No more would it be binding on this Court after removal. After removal the decision of the State Court is of equal but not greater obligatory force in this Court than it was in the State Court before removal. If it was binding on the State Court on a subsequent appeal, we are prepared to concede that it would be binding on this Court, or the Circuit Court of Appeals. As it is not binding on the Supreme Court of Alabama on a subsequent appeal, no more is it binding on this Court or on the Circuit Court of Appeals. The Statute takes away from the decision of the State Supreme Court the quality of res adjudicata. After remandment, the parties are not estopped either in the lower Court or in the Supreme Court of the State again to litigate the same question. It would be the duty of the lower Court to follow the former decision of the Supreme Court of the State, not because the decision was res adjudicata as between the parties, but because the decision of a court of last resort, until reversed, is the law of the land, whether rendered in a case between the same or different parties. This relation does not hold good between a state and Federal Court on a question of general or commercial law. The question of res adjudicata, however, does not give the decision its binding force even on the lower State court. So when the case comes by removal to the Federal Court, the decision, which was not res adjudicata as between the parties in the State Court, does not acquire that quality by removal. The decision has the same effect in the Federal Court that it did in the State Court. The

Circuit Court of Appeals stood in the same position, exactly, as the Supreme Court of Alabama, and had the right to decide the question as the law then appeared to it, and without reference to the former decision of the State Supreme Court of Alabama. In the case of Northern Pacific Railroad Co. vs. Ellis, 144 U. S., 458, this Court in the second paragraph of the syllabus, say:—"In Wisconsin, the decision of the State Supreme Court upon a demurrer is conclusive upon the questions legitimately involved, and is res adjudicata, and such Court has no power upon a second appeal of the same case to review that judgment nor can this Court do so." In the opinion, after stating that in Wisconsin a decision on an appeal from an order overruling or sustaining a demurrer was res adjudicata, between the parties, the Court said: "Its conclusion had been announced, its mandate had gone down, and it had no power upon a second appeal to review that judgment. This is the settled rule in Wisconsin. *Under these circumstances* the judgment of the Supreme Court is not subject to review here." The Court expressly limit the application of the doctrine of res adjudicata to cases where the decision is binding on the State Court of last resort. It is very clear that the binding force of the decision of the State Court on this Court is limited to cases where that decision is binding on the State court itself on a subsequent appeal. In the case at bar, the decision of the State Court is by statute declared not to be binding on the State Court on a second appeal. For this reason the doctrine of res adjudicata invoked by petitioner has no application. Counsel for petitioner has cited no case where the decision of the State Court was held to be binding on this Court, unless it was also binding on the State Court, or on the parties in the State Court. Section 683 A. of the Code of 1886 of Alabama, is as follows:

"The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what in its

opinion at that time, is law, without any regard to such former ruling of the law by it; but the right of third persons, acquired on the faith of the former ruling shall not be defeated or interfered with by or on account of any subsequent ruling."

Bucher vs. Cheshire R. R. Co., 125 U. S. 555.
Scotland County vs. Hill, 132 U. S. 107.
Gardner vs. Mich. Cent. R. R. Co., 150 U. S. 349.

III.

The wrongful quitting of the work imposed upon the defendant-in-error by the terms of the contract sued on would justify the plaintiff-in-error in refusing to proceed with the contract, and in declining to further pay the compensation provided for in it. The facts as to defendant-in-error's quitting work were such as to make it a question for the jury as to whether such quitting was with legal excuse, if they did not, as matter of law, show that such quitting was without legal excuse. Assignments of error Nos. 1, 7, 8, 9, 16, 18 and 19. Record Pages 50-2-3.

Authorities on this proposition:

Dorst vs. Mathieson Alkali Works, 81 Fed. 284.
Pope vs. Lathrop, 46 N. E. Rep. 154.
Norris vs. Moore, 3 Ala. 677.
Spain vs. Arnott, 2 Stark, 256.
Lantry vs. Parks, 8 Cowen, 63.
Winn vs. Southgate, 17 Vt., 355.
Posey vs. Garth, 7 Mo., 94.
Renno vs. Bennett, 3 Q. B., 768.
Turner vs. Mason, 14 M. & W., 112.
Ford vs. Danks, 16 La. Ann. 119.
14 Am. & Eng. Encyc; XIV, pages 788-9 and note.
Wood, Master & Servant, Sec. 116, page 219, Sec. 119, page 227.

The undisputed facts attending the quitting of the work, defendant-in-error was employed at and assigned to, are that the defendant-in-error had been working on opposite shifts with a convict named Dunn, with whom he had fallen out. On one Sunday morning, shortly before his discharge, defendant-in-error went to his superintendent and told him he couldn't work with Dunn. Dunn had been off for two weeks, and defendant-in-error had just heard that he was to be put back. To quote his own language (Page 36, Record): "I told Mr. Rogers I couldn't work with him. He said: 'I don't see why you can't.' I said: 'I will work with anybody else, but I can't work with Dunn.' And the next Monday morning I went to Mr. Rogers and said: 'I am ready to go to work any where you put me.' He said: 'You won't work with Dunn.' And I said: 'I can't work with Dunn.' * * * * After the conversation I had with Mr. Rogers Sunday morning, I went to the compressor and stayed all day with it. After the conversation I had with Mr. Rogers Monday morning I went back home and told Mr. Rogers I would be there if he wanted me, and then in the forenoon or afternoon, he gave me my discharge and I gave it back. I don't know who ran the compressor after Monday. I never ran it any more." On page 38 of the Record, defendant-in-error's testimony shows that he had had a personal difficulty with Dunn, who he claimed was a dangerous man, and that personal fear of Dunn was the reason that induced him to decline to work with him or rather on opposite shifts with him. There is no contention that this ground for refusing to work with Dunn was ever communicated to plaintiff-in-error or its agents at any time before the trial of the cause. Defendant-in-error's own testimony shows that he was asked by Rogers why he couldn't work with Dunn, and it also shows that he gave Rogers no reason for refusing to do so. (Record, Page 38-39.)

The plaintiff-in-error on the trial objected to the testi-

mony relating to Dunn's character, to the personal difficulty between Dunn and defendant-in-error and to the statement by him of his uncommunicated reason for declining to work with Dunn. (Record, Page 38, Assignments Nos. 7, 8 and 9.) The grounds of objection were that the evidence was immaterial for two reasons. Conceding that it had been communicated to plaintiff-in-error at the time of the refusal, it would have been an insufficient ground for the disobedience. Not having been communicated to plaintiff-in-error at all, it could have no effect on the rightfulness of plaintiff-in-error's action in discharging defendant-in-error.

A servant is bound to obey all reasonable orders of his master, and a failure or refusal to obey an order, when wilful, justifies the master in terminating the contract of employment, if the master elects to do so. The testimony of the defendant-in-error shows that he was assigned to run the engine at the compressor by plaintiff-in-error. (Record, Page 39.) A refusal to continue at this work on the part of defendant-in-error would be a disobedience of an order of his employer, and could be justified only on the ground that such order was unreasonable. That the order was originally a reasonable and proper order is not disputed. It is contended that it became unreasonable only by virtue of the fact that defendant-in-error and Dunn had fallen out and that defendant-in-error was afraid of Dunn. The undisputed testimony (that of defendant-in-error himself, Record Page 36) shows that defendant-in-error ran the engine in the day time, and that until four o'clock in the afternoon Dunn was not near the engine at all. Dunn was on the night shift and came on at four in the afternoon. Defendant-in-error would stay about the engine until five or six in the evening and then go home and not come back till seven next morning when Dunn went home. The engine was in the open air, not in any mine underground. There were men working near the engine and guards close to it at the mouth of the slope. Defendant-in-error himself testified

that Duun was all right except when he was in liquor, and that he was infrequently in that condition. (Record, Page 38.) At the time of the personal difficulty with Dunn, defendant-in-error made no complaint to Rogers of it, and worked two weeks after, but during this time Dunn was sick. (Record, Page 39.) Boiled down, it appears from the undisputed testimony that the only justification dedendant-in-error had for refusing to work with Dunn was that he considered him a quarrelsome man when drunk; that he rarely got drunk; that he had had a verbal misunderstanding with him, and claimed to be afraid of him. The testimony shows that the real and ultimate objection defendant-in-error entertained to working with Dunn was that he had had a difficulty with him, and it would be unpleasant to associate with him. No reasonable man could be afraid to work with another, who was a convict, in the presence and immediate neighborhood of guards and free white laborers, especially where the convict is admittedly a peaceable, well-disposed man except when drunk, and it is hardly probable that a convict running a stationary engine would be allowed to go on duty when drunk.

Muller vs. Gilkinson, 19 Vt. 503.
Patterson vs. Gage, 23 Vt. 558.

Our contention is that such facts as matter of law are insufficient to justify a servant in refusing to work at the task assigned him by his master. If not as matter of law, clearly, the plaintiff-in-error was entitled to go to the jury on this question. The court below in refusing to give the third charge requested by plaintiff-in-error (Assignment 39, Page 53), as well by giving the charge requested by defendant-in-error (Assignment 16, Page 53) withdrew the issue of wrongful conduct on the part of defendant-in-error from the case. Wood in his work on Master and Servant Section 119, Page 227, says: "Refusing to obey the reasonable orders of the master is a good ground for dismissal

from service, for in every contract of hiring there is an implied contract on the part of the servant that he will obey the reasonable and lawful commands of his master. But if the command of the master involves the doing of an unlawful act, or is unreasonable, involving services not connected with his employment, or within its contemplation, or which would expose the servant to hazards and dangers not incident to the business, the servant may refuse to obey without subjecting himself to dismissal on legal ground. *But in all such cases the question of reasonableness is one of fact*, and the servant would be required to establish the unreasonable character of the command by evidence that is clear and unequivocal, *as the law will not tolerate insubordination on the part of servant, unless it clearly supported by a legal and valid excuse.* But in determining this question, reference must always be had to the contract, the nature and character of the business for which the servant was employed, and the command itself. What might be regarded as insubordination in a servant employed in one capacity, might not be so regarded of a servant in another, *therefore the question is one of fact for the jury.*" The plaintiff-in-error was at least entitled to have this issue submitted to the jury. It was taken from the jury by the general affirmative charge given at request of defendant-in-error.

Up to this point, we have discussed this question on the idea that the reason, assigned by defendant-in-error on the trial for refusing to work on the compressor engine, if Dunn worked the opposite shift, was communicated to the plaintiff-in-error or its agent at the time of such refusal, and even in this aspect of the case we contend it was either insufficient as a matter of law or at least left the sufficiency a question for the jury to determine. In view of the fact that the testimony is undisputed that the defendant-in-error though requested to do so, failed to give any reason for his refusal to work with Dunn to Rogers at the time of his refusal and discharge or at any time after until the trial of his cause, we submit that the excuse was clearly insufficient

as matter of law, and that the court should have so charged as requested to do by the second written charge of plaintiff-in-error. (Assignment 18, Page 53), and should have excluded the testimony covered by Assignments 7, 8 and 9. In the case of Turner vs. Mason, 14 M. & W. 112, the servant absented herself from her master's service against orders to visit her dying mother. Baron Parke in the opinion in this case, said: "Even if the replication disclosed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her disobedience of his order." In speaking of this case, the annotator of Wood on Master and Servant, says: "But it should be remarked that the evidence in this case did not disclose that the *master knew that the mother was dangerously ill* or that the *servant informed him that that was the cause of her absence.* It may be doubted whether the Courts of this country would regard the disobedience of such an order, under such circumstances, *the master having notice of the cause of its violation*, as such evidence of insubordination as would justify the servant's dismissal; indeed, it would seem that such an order might be regarded as unreasonable." (Wood Master & Servant 2nd edition, page 228 note.) We have no hesitation in agreeing with the annotator as to the unreasonableness of such an order if the master knew the circumstances. In the absence of such knowledge, the order would be perfectly reasonable. So in this case, if it could be contended that Rogers' order for defendant-in-error to continue work at the compressor engine with Dunn was unreasonable in any event, it could only be on the assumption that Rogers knew or was informed by defendant-in-error of the facts that he relied on to justify his refusal. Defendant-in-error's own testimony shows that he not only refused to continue work with Dunn, but also refused to state his reason for so refusing. (Record Page 38-39.) No clearer case of wilful disobedience to orders of the master could be imagined, and we submit that such disobedience justified the instant discharge of defendant-in-error.

Having been legally discharged, his subsequent offer to return, imposed no duty on plaintiff-in-error to take him back. Mere absence for a day without any wilful disobedience of orders has been held to justify the master's refusal to take back the servant on his offer to return. (Ford vs. Danks 16 La., Ann. 119-Wood, pages 219-220, Sec. 116.) The test of such right to discharge depends not on the length or duration of the absence from the service, but upon the necessity of the presence of the servant and the consequent injury to the master's business. Defendant-in-error was running a steam engine. His constant presence was absolutely necessary to the master's business. This he admits himself. (Record, page 39.) Any absence, however short in duration, would justify the master in refusing to take the servant back under such circumstances. When the refusal to obey the order is wilful and without legal excuse, no offer to return after such disobedience on the part of the servant will require the master to take the servant back. In the case of Lantry vs. Parks, 8 Cowen 64, the Court says: "It is supposed that the offer to return should take this case out of the general rule. But if there was a wanton desertion of the defendant's service, without his fault, the plaintiff was guilty of a violation of the contract, and the defendant was under no obligation to receive him again. No cause whatever is shown in the case, for the plaintiff's conduct." And in Wood on Master & Servant, Sec. 162, page 318, it is said: "Where the servant abandons the master's service, the contract is at an end, to such an extent that the servant cannot require the master to restore him to his service under the contract." The Court will observe that defendant-in-error never offered to return to work unconditionally. He coupled his offer with the stipulation that he should not be required to work with Dunn. (Record, page 36.) Even his letter written four days after he quit, does not expressly withdraw this condition. (Record, pages 39-40.)

The Court below held that a voluntary and inexcusable

abandonment of the service of the plaintiff-in-error by the defendant-in-error would not be a defense to this action, and on this theory sustained a demurrer interposed to the second plea of the plaintiff-in-error. (Assignment of error 1, page 50.) This was on the idea that there could be no recission of the contract, as there could be no complete restoration of the consideration moving from the defendant-in-error. The correctness of this ruling, we discuss hereafter in this brief. If it be conceded to be correct, the refusal of the Court to give the sixth written charge requested by plaintiff-in-error, (Assignment No. 22, page 54) presents the question disembarrassed from any such legal question. The plaintiff-in-error filed a plea of recoupment to which no demurrer was interposed. On this plea, it asked a charge that if the jury believed the defendant-in-error quit the service of the plaintiff-in-error without legal excuse, the jury should find for the plaintiff-in-error under its plea of recoupment and assess such damages as they might believe from the evidence were sustained by plaintiff-in-error from such wrongful quitting of its service by defendant-in-error. The effect of the refusal of this charge was to hold as matter of law that the defendant-in-error had not wrongfully quit the service of the plaintiff-in-error, under the evidence in the case. The determination of this question was for the jury and the plaintiff-in-error was entitled to have this charge given. The damages under this plea were not limited to four days as contended by counsel for defendant-in-error, because plaintiff-in-error was under no obligation to take defendant-in-error back after he quit without excuse. The reasonable value of his services were shown to be sixty or sixty-five dollars a month. (Record Page 43.)

It was successfully contended by counsel for defendant-in-error in the trial court that if the defendant-in-error had wilfully refused to work, or even had fraudulently intended at the time of entering into the contract to do no work, and no work had ever been done, the plaintiff-in-

error could not rescind the contract for that reason, since it never could restore the main consideration received, viz: the release of the cause of action for defendant-in-error's injury. For this reason the Court sustained a demurrer to the second plea (Assignment No. 1, page 50), and refused to give the second and third charges requested by plaintiff-in-error (Assignments Nos. 18 and 19, page 53), and gave the affirmative charge requested by defendant-in-error (Assignment 16.) Counsel for defendant-in-error contends that the second plea was bad because it did not answer the whole complaint. This is manifestly incorrect. Its purpose was to completely defeat a recovery by showing a rightful discharge of defendant-in-error. If the proof had sustained it without conflict, the court would have charged the jury to find for plaintiff-in-error. It clearly answered the complaint in full. We do not dispute the rule that when a defrauded party seeks to rescind a contract because of fraud in its inception it is essential that he first restore the consideration received by him from the party to whom it is to be restored. Has this rule any application to the case at bar? Is the plaintiff-in-error seeking a recission of the contract sued on? In the cases relied on by counsel for defendant-in-error in his brief, the parties against whom this rule was successfully invoked were the actors in the suit, seeking to set aside the contract and recover back what they had parted with to the defrauding party, and the Court held that they could not recover back what they had paid out on the contract without restoring what they had received from the defrauding parties. In the case at bar, there is no question of rescinding for fraud, nor any question or claim of fraud or of rescission at all. The plaintiff-in-error was not the actor or plaintiff in the court below, but was the defendant. By its plea, it sought no affirmative relief, but merely interposed a bar to the relief sought by defendant-in-error. It asked no rescission of the contract. The second plea simply sets out the failure of the defendant-in-error to comply with the con-

tract on his part as a defense to the action. (Record, page 24-5.) This defense could be made as well under the general issue. In actions on contracts, the burden is on the plaintiff to show that he complied with the contract on his part. The complaint or declaration in actions on contracts, to be complete, must aver such compliance. "In an action upon a contract to pay for personal services, performance of the consideration must be alleged, except where such performance was prevented by the act of God or the act of law." (4 Am. & Eng. Encyc. Pleading and Practice 626 c.) "Where the performance of ones duties by the terms of the contract is made a condition precedent, either expressly or by implication, he can only recover by pleading and proving that he has faithfully discharged those duties or that the other party has waived the performance of them." (7 Am. and Eng. Encyc. Law, new edition, Page 145.) The complaint in this cause contains this averment (Record, page 15): "and that he has at all times since the said contract was entered into fully carried out and performed the stipulations on his part to be done and performed." It was necessary for the defendant-in-error to prove this allegation even in the absence of any special plea. The plea of the general issue put it in issue. To prove it, it was necessary for him to show that he had been guilty of no violation of the terms of the contract. One of the implied terms was that he should obey the reasonable orders of the master, and not absent himself from the service of the master. In a general way he was bound to show, to make out his case, that he had violated neither of these implied contractual duties. The plaintiff-in-error similarly had the right to show that defendant-in-error had violated these implied terms of the contract and this without any special plea. Can it be said that the plaintiff-in-error cannot defend by disproving a fact, which is essential to the defendant-in-error's right to recover. In the case at bar, the testimony of the defendant-in-error affirmatively showed that

he had first broken the contract, or at least tended to show that fact. The questions in issue were whether there was a contract, whether defendant-in-error kept the provisions binding on him, and whether the plaintiff-in-error broke those or one of those binding on him. Yet if the contention of the defendant-in-error be conceded, the fact that the proof showed that the defendant-in-error had not kept the contract on his part, is not material and cannot be relied on by plaintiff-in-error as a defense to the suit. In other words the absence of proof of one of the essential elements of defendant-in-error's right of recovery would not prevent him from recovering. Stronger than this, though it was affirmatively shown and that by defendant-in-error's own proof that this essential element not only did not exist, but that the contrary did exist; yet the plaintiff-in-error could not rely on this state of facts as a defense to the suit. The fallacy arises from applying a rule which concerns only the rights of an actor in seeking relief affirmatively, to that of a defendant seeking no relief but merely defending against relief sought by the other party. All the cases cited by counsel for defendant-in-error on his brief, were cases in which a plaintiff was seeking to rescind or set aside a contract and recover what he had parted with in reliance on it, and the rule was applied as against such plaintiff. In no case has the rule ever been applied to a defendant who was seeking no affirmative relief, but merely defending against an action for breach of a contract. In every case where an entire contract of employment is broken by the servant after partial performance, it is clear that it is impossible for the defendant to restore the consideration moving from the plaintiff (that part of the work which has already been performed) yet would anyone contend that because of this impossibility, the defendant, when sued by the plaintiff for a breach of the contract could not reply that the plaintiff himself had first broken the contract. We submit that the rule relied on has no application to the case of a party merely defending against an action for breach of a

contract. The rule is by its terms confined to cases where by reason of some fraudulent inducement at the time of entering into the contract, one party upon afterwards discovering it, is given the right to rescind or set aside the contract and recover what he parted with under it, upon condition that he restore what he received. In the case at bar, no reason for rescinding the contract sued on, arising out of any fraud at the time it was entered into, exists or is contended for by the plaintiff-in-error. It seeks no such redress. It admits the validity of the contract and that it was binding on both parties according to its terms. It does not claim to have been defrauded by defendant-in-error, and does not ask to have the agreement set aside for that reason or any reason. Recognizing the validity of the contract, it simply says to the defendant-in-error, when sued upon it, "You broke it first, and the law says that before you can recover for a breach of the contract, it must appear that you kept it on your part." The plaintiff-in-error filed no special plea of fraud in which he asked the Court to grant him relief by setting aside the contract and restoring the *statu quo*. If it had done this or if it were suing the defendant-in-error for the restoration of the consideration it parted with to the defendant-in-error, there would have been an opportunity for counsel for defendant-in-error to reply that plaintiff-in-error had failed to restore what it got under the contract. Did anyone ever hear that it was a condition imposed on a defendant before defending an action for breach of contract on the ground that plaintiff had first broken it, that he should restore the plaintiff to his *statu quo*. The basis of the rule is that the party seeking the recission has an election to avoid the contract because of fraud, and as a condition of the exercise of this election, he must first restore the defrauding party to his *statu quo*. Has the plaintiff-in-error in this case any election that he is required to exercise before defending the suit, on the ground that defendant-in-error first broke the contract?

The case of Snow vs. Alley, 11 N. E. Rep. 764, relied

on by counsel for defendant-in-error was a suit to recover one hundred thousand dollars worth of bonds, the consideration of an alleged fraudulent agreement, which the plaintiff sought to avoid for the fraud. It was impossible to restore the parties to the contract to the *statu quo*. The Court say: "The rule, as given by most eminent judges, certainly excludes the plaintiff in the case at bar from any right to rescind the contract, or to recover in the *form of action*, he has adopted, the value of the property he has parted with." This is surely not the equivalent of saying that if the plaintiff in that case had been sued for a breach of the same contract, he could not defend by showing that the defendant in that case, had first broken the contract. The rule is expressly limited to cases where a rescission of the contract is sought, and a form of action adapted to that form of relief is brought.

So in the case of Jones vs. Anderson, 82 Ala., 302, cited by counsel for defendant-in-error, the Court say: "When a purchase of property is made by one person from another, by a false pretense, or other like fraud, the party defrauded may elect to rescind the sale within a reasonable time after discovery of the fraud. But there can usually be no rescission, unless both parties can be restored practically to the condition in which they were before the contract was made. This involves the restitution of whatever of value each may have received under the cantract. *Where this can be done*, it must be done, or an offer made to do so, by the party proposing to rescind; unless he shows an excuse for failing to make such offer, as that it would have been fruitless, or for other good reasons." This was an action of detinue to recover the specific property, which the plaintiff had sold the defendant under an alleged fraudulent contract of sale. The distinction between this case and the case at bar is apparent. And even in cases where the rule is held to be applicable, the Court limit the rule to cases where restitution is possible.

## IV.

The proper measure of damages.

This was an action for the breach of a contract of employment. The Court below construed the contract to be one for the life of the defendant-in-error on the ground that its duration was the period of his disability, which was permanent. In coming to the question of damages, the Court at the request of the defendant-in-error gave a charge to the effect that the measure of recovery was the amount of the installments of wages with interest which had fallen due up to the time of the trial, without any deductions for what the defendant-in-error might have earned, or what benefit the plaintiff-in-error was deprived of by the loss of his services. This being a contract of employment, the general rule as to the measure of damages for the breach of such contracts applies. That rule is that in an action which treats the contract as completely broken and goes for damages for the breach of it *in solido*, the measure of damage is the loss suffered by the servant up to the time of the trial, deducting therefrom what wages he did or could by the exercise of reasonable diligence have earned in the interim in a similar character of employment. The charge given at defendant-in-error's request (Assignment No. 16, Record Page 53) was erroneous in that ignored and took from the jury all consideration of any deduction to be made for what the jury might have believed the defendant-in-error either did or might have earned during the time from his discharge to the time of the trial. The rule is supported by the weight of authority. It is peculiar to actions for breach of contracts of service or employment and prevails in Alabama where the contract sued on was made as is shown by the unbroken line of authorities from that state cited below.

14 Am. Eng. Encyc. Law, Page 797, Sec. 15 and cases in note.

Davis vs. Ayres, 9 Ala. 293.
Fowler vs. Proutt, 24 Ala. 194.
Strauss vs. Meertief, 64 Ala. 306.
Wilkinsons vs. Black, 80 Ala. 329.
Liddell vs. Chidchester, 84 Ala. 508.
Everson vs. Powers, 89 N. Y. 527.
Sutherland on Damages, Vol. II, Page 472.
Wood Master & Servant, 2nd Ed., Sec. 127, Page 260.
McDaniel vs. Park, 19 Ark. 671.
Rogers vs. Parham, 8 Ga. 190.
McMullen vs. Dickinson, 62 N. W. Rep. 120.
Bassett vs. French, 31 N. Y. S. 667.
Hamilton vs. Love, 43 N. E. 873.
Zender vs. Seliger-Toothill Co., 39 N. Y. S. 346.
Gordon vs. Brewster, 7 Wisconsin 355.
Sutherland vs. Wyer, 67 Me. 64.
Pritchard vs. Martin, 27 Miss 305.
Darst vs. Mathieson Alkali Works, 81 Fed 284.
Pope vs. Lathrop, 46 N. E. 154 (Indiana).
Martin vs. Everett, 11 Ala. 375.

In Wood on Master & Servant, Sec. 127, Page 260, it is said: "And there is no question but that this is the rule in England, but I am aware of no case in this country in which a similar rule has been adopted, but, upon the contrary, the drift of American decisions is opposed to any such rule of recovery, and limits the judgment to the servant's actual loss up to the day of trial."

In Sutherland on Damages, Vol. II, Page 472, the author says on this subject: "The full damages for the term cannot be assessed in advance * * * (Citing from the opinion in a Wisconsin case) Cole J. said: 'In any business the price of labor fluctuates greatly within four years (the contract period in that case) particularly is this true in the lumbering business in this country. Now suppose the respondent could only obtain for his services next year five hundred dollars, and so on, would it not be unjust

to say that he should only recover according to the rule adopted by the jury in this case. Or suppose that the value of his labor should rise so that he could obtain for his services two thousand or twenty-five hundred dollars a year, what then would be his loss for the failure of appellant to fulfil his contract? Still further the difficulty presents itself. Suppose the respondent should die within the four years, or become incapacitated to perform service of any kind, would he be entitled to recover the damages he has recovered? As the case now stands we think he was only entitled to recover his salary on the contract down to the day of trial deducting therefrom any wages which he might have received, or might reasonably have earned in the meantime."

In case of McMullen vs. Dickinson Co., 62 N. W. Rep. 120, is an instructive one. After demonstrating the unsoundness of the former doctrine of constructive service, and as well the injustice of the rule of those courts which, having abandoned the doctrine of constructive service, deny to the discharged servant any recovery except in an action for damages for breach of the contract, recoverable *in solido*, the Supreme Court of Minnesota, say: "No one action to recover all the damages for such a breach of contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity, as must necessarily be given by awarding him prospective damages. His contract was not a speculative one and the law should not make it such." And again: "The fallacy lies in assuming that on the breach of the contract,

loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute, in the other, it is contingent. * * * In the one case, the liability is a contingent liability for loss of wages, in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so whether prospective or retrospective." And again: "It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. The liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. * * * The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough, this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elect, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all the same accruing up to the time of trial."

The rule laid down in the cases and text books cited ap-

plies generally to contracts for service. The only difference in the facts of the cases is that the duration of the employment is for months or years, instead of for life, in those cases. The reason of the rule applies with still greater force to contracts of service for life than for a term of years or months. The reason of the rule is that all damages beyond the time of trial, that may be allowed, are purely speculative. The plaintiff immediately after the trial might obtain employment at a greater compensation than he would have been entitled to had the contract remained unbroken. If he is not satisfied to accept in full of his damages what amount he has suffered up to the time of the trial he has an election to treat the contract as subsisting, and sue for each month's installment as it becomes due. In this way, he can recover all he could ever be entitled to, had the contract remained unbroken, and in the manner and times as provided for by the contract. In a contract for life the duration of the contract depends upon the uncertainties of life, and the plaintiff-in-error should not be made to pay for those uncertainties in the way of damages which are purely speculative. The defendant-in-error having the right to elect as to the form of his remedy, so that he can fully protect himself, and still impose no hardship on the plaintiff-in-error, by bringing an action for each installment as it falls due or a number of past due installments in the same action, ought not to be allowed by electing to bring one action for all his damages immediately upon the breach of the contract, to impose on the plaintiff-in-error who has no choice in the matter, the risk of paying damages, which the future may show the defendant-in-error would never have suffered, had the contract remained unbroken. The defendant-in-error in this case may die the day succeeding the final trial, and after he has recovered damages for the period of a number of years subsequent to his death. This risk the plaintiff-in-error should not be made to assume since the law allows the defendant-in-error to protect himself from suffering any loss by instituting each month an

action for the amount due for the preceding month, and allows the plaintiff-in-error no option as to the form of suit. There is an obvious reason why the rule that applies in cases of actions for causing the wrongful death of a decedent should not apply to cases of actions for breaches of contracts of employment, since in the former there is no possible way of determining how long the decedent would have lived but for the wrongful act, and the plaintiff in such suits has no election, but must recover all his damages at once, or not at all. The necessity of the case justifies a rule which frequently works great hardship on defendants. No such necessity exists in such cases as the case at bar, and when the necessity ceases, the rule itself should cease. There is no difference in effect between the contract in this case, and an ordinary contract for service, and the rule applies generally to all contracts for service, whatever their term or duration may be, that the recovery of damages is limited to those which are determinable without resort to speculation, i. e., those which have accrued up to the time of the trial. Nor can the fact that in this case, a release of defendant-in-error's cause of action formed part of the consideration for the employment affect the rule. The defendant-in-error, by bringing an action for successive installments as they fall due, has it in his power to get just what the contract provided he was to get. So while his cause of action for his injury cannot be restored to him, he still has the right under the law to get exactly what he parted with his cause of action for. Having this right, and declining to pursue it, we submit that he should not be allowed to speculate on damages which the event might show he would never have suffered.

The Court below, by giving to the jury the charge requested by defendant-in-error (Assignment 16) withdrew from the consideration of the jury the question of deducting from the amount due on the face of the contract, what the jury might find from the evidence, defendant-in-error

did in fact or might have earned after his discharge and up to the time of the trial. This was error.

The defendant-in-error testifies: "The only work I have ever done on it (the land he bought at Cowles Station after his discharge) is to put out some fertilizer and superintend the work on the farm." Record Page 35. From this testimony the jury had the right to infer that he actually did work of value, which should be deducted.

Regarding his ability to work after he was hurt, defendant-in-error, testifies: "I ran the compressor at the mines for over a year after I got well after I was hurt." Record Page 35.

Regarding this same matter, witness Dr. R. M. Cunningham testifies: "I think the plaintiff can run a stationary or locomotive engine in his present condition." Record Page 41.

In regard to this same matter, witness W. L. Rogers testifies: "The plaintiff had charge of the compressor. He ran it and greased it, and looked after it just as any other man would do. Sixty or sixty-five dollars would be a reasonable value for the work he did in running the compressor. He ran it and kept it up for a year or a year and a half, as well as anyone could do." Record Page 43.

Thus the record discloses evidence tending to show that defendant-in-error after his discharge actually performed labor of value on his farm, for which the jury were given no right by the Court to make allowance; and also that he was physically able after his discharge and up to the time of the trial to run a stationary or locomotive engine (labor of the same character as he had been engaged in before his discharge, and which he was bound to seek after his discharge, if able to perform it). The only reason he assigned in his testimony for not seeking it was that he was physically disabled from performing it. The legitimacy of this excuse was, under the evidence in the record, a question for the jury. The evidence tended to show that the reasonable value of services such as he was required to seek, if able,

was $60.00 or $65.00 a month. The question of deduction for the value of such service should have been left to the jury, and the Court erred in directing the jury to find for defendant-in-error the full amount due by the contract, irrespective of such deduction.

Counsel for defendant-in-error insist that no deduction should be made from the amount of wages due the defendant-in-error for what he might have earned or did earn during the period of the contract for which a recovery was had. They deny the right to deduct for two reasons.

First, because the defendant-in-error, as they contend, was so disabled that he could do no work. We submit that this was purely a question of fact for the jury.

Second, because they say the contract of employment was incidental and collateral to the release, which, as they contend, was the main subject matter of the contract. The case of Frazier vs. E. T. V. & G. R. R. Co., 12 S. W. Rep. 537, relied on in support of this point, is distinguishable from the case at bar, for the reason that the terms of the contract in the two cases were unlike The Court, through Justice Lurton, say of the contract in the Frazier case: "He, on his part, agreed to do such work in the shops of the company as he should be called upon to do, and which he might be physically able to do. If any question should arise as to his ability, then it was agreed that Dr. Deadrick should settle such question, and if he should decide that complainant was able to do the work required, then his payments should be abated for the time lost." Of this contract the Court says that it was a contract for a settlement of personal injuries, and that the amounts paid by the railroad company were payments on that settlement, and that the labor provided for by the injured man was merely incidental, and that the value of his time should not be deducted from the verdict. The Court say: "The agreement that he should, if able, render services in their shops, if called upon, was a mere incident of the settlement, and the sums agreed to be paid him are not for work and labor,

but are agreed payments in liquidation of damages, to be reduced by the value to them of his services to them in their shops, if he should ever be called upon to so labor, and should be physically able. This demand is therefore one for personal injuries. We think it was error to abate his claim by the value of his labor in his own store. *He was never called upon to perform any labor for defendant*, and was unable, if he had been, to have rendered service in their shops for any considerable part of the time. His time and labor belonged to himself unless he was able to work in their shops, and wrongfully refused to so work when called." In the Frazier case the plaintiff was not, by his contract, obligated to give his labor to defendant until called upon to do so. Up to the time of the trial, he had not been called upon to perform any labor for defendant. In the case at bar, the contract recognizes not only the present and immediate obligation on the part of defendant-in-error to work for plaintiff-in-error, but also the fact that he was then working for plaintiff-in-error, and the contract purports on its face to have been made for the purpose of regulating the terms of that service. Instead of the service to be performed being merely incidental to the main purpose it is clearly in the contract in the case at bar, the principal subject matter of the contract. Defendant-in-error having resumed work, its purpose was to fix the terms of the service. In the Frazier case the Court held that the defendant had no right to the plaintiff's time until he was able to work in defendant's shop, and until the defendant called on him to do so. Neither of these contingencies having arisen before the trial, the contract of service had not then come into effectiveness, and as by its terms the defendant was only entitled to the value of plaintiff's time in the event of those contingencies, the defendant, as a matter of course, had no right to claim any deduction for what plaintiff earned in his own store. Until called upon to work for defendant, by the express terms of his agreement, his time belonged to himself alone. In the

case at bar, from the time of the execution of the contract sued on, the defendant-in-error's time belonged to the plaintifl-in-error by the very terms of the contract. The contract recited that defendant-in-error had resumed work, and was to do such work as he had been doing and was able to do, for the stipulated compensation. The difference is that in one case the railroad company defendant was not entitled to the injured man's services either because of his disability to perform them or because he has not been called upon to perform them, while in this case the plaintiff-in-error was entitled to them.

## MISCELLANEOUS ASSIGNMENTS.

The fourth and fifth and thirteenth and fourteenth assignments of error are based on exceptions to the exclusion of testimony as to the terms of the first and second oral agreements, mentioned by way of recital in the written agreement sued on. (Record, pages 36, 37 and 44.) These agreements were both originally in parol. The mere recital of them in the written contract did not make that written contract the best evidence of the agreements. The written contract is to be interpreted in connection with the previous contracts. The trial judge held that the three contracts were simply one continuous negotiation, consummated in the final written agreement with release of defendant-in-error's cause of action. Proof of the terms of the first and second agreements were material to the proper construction of the last and written agreement. The offer was to show that in neither verbal contract did Pierce release his cause of action for personal injury. (Record, page 37). The exclusion of this testimony was for that reason erroneous.

The twenty-fourth assignment of error was predicated on the refusal of this charge: "If the jury believe from the evidence in this case that Pierce, at the time he was discharged by defendant, was no longer disabled within

the contemplation of the contract sued upon, then the jury must find a verdict for the defendant." The period of the contract was either indefinite and indeterminate or determinable at the will of the parties or it was during disability. Disability is not synonymous with permanent injury. It means disability to work. Whether defendant-in-error, at the time of his discharge was able to work, was a question for the jury. If the jury believe from the evidence that he was not so disabled, then the contract was terminable at the will of the plaintiff-in-error and it was guilty of no violation of the contract in summarily determining it.

Respectfully submitted,

Walker Percy,
Wm. F. Gubb,

Frank H. Pierce, Plaintiff-in-Error,

vs.

Tennessee Coal, Iron & Railroad Co., Defendant-in-Error.

BRIEF OF COUNSEL FOR DEFENDANT-IN-ERROR ON THE WRIT OF ERROR SUED OUT BY FRANK H. PIERCE.

The first error assigned by Frank H. Pierce is based upon the exclusion of testimony in relation to the age, health, habits of life, and expectancy of life of plaintiff-in-error. If the Court properly charged as to the measure of damages this testimony was properly excluded. The proper measure of damage has been fully discussed in our brief on the writ of error of the Tennessee Coal, Iron & Railroad Company, and we can add nothing to what was there said.

Plaintiff-in-error's bill of exceptions (Record Pages 61-2-3) fails to disclose any exception as the basis of the second assignment of error.

Conceding that the measure of damage to be as contended for by plaintiff-in-error, the refused written charge No. 1, which is the basis of the third assignment of error was rightfully refused because its effect is to charge that plaintiff-in-error was entitled to recover as a matter of law on the merits of the case. The defendant-in-error, under the testimony was entitled to go to the jury on the issue of the rightfulness of the discharge of plaintiff-in-error, and on the issue presented by defendant-in-error's plea of recoupment. The like reason justifies the refusal of charge No. 2 which is the basis of plaintiff-in-error's fourth assignment of error, (Record page 66) regardless of its correctness on the question of damages.

We submit that the plaintiff-in-error can take nothing from his exceptions to the rulings of the Court on the ques-

tion of the measure of damages for the additional reason that he requested in writing a charge ( Record, page 46 ) embodying the measure of damages as given to the jury by the Court. This was an express acquiescence in the Court's charge on the question of damages, and a waiver of the exception to the exclusion of the testimony set out in the first assignment of error and to the charges refused at his request. The record shows (page 46( that counsel for plaintiff-in-error prepared a written charge and handed it to the Court to be read to the jury, which was read to the jury by the Court, and which charged that there could be no recovery of damages beyond the time of the trial. No exception was reserved to the giving of this charge by plaintiff-in-error, and the Court had the right to presume that the charge was acquiesced in and consented to by counsel for plaintiff-in-error. This failure to except was a consent that the rule of damages therein set out should be the law of the case and estopped plaintiff-in-error from relying on the assignments raising that question.

Long vs. Fox, 100 Ill. 50.
Badgett vs. Johnson Fife Hat Co., 29 U. S. Circuit Court App. 233.
Noble vs. Blount, 77 Mo. 241.
Fairbanks vs. Long, 4 S. W. 499.
Walton vs. Railway Co., 6 U. S. C. C. A. 223.
Nitche vs. Earle, 19 N. E. 749
Downing vs. West, 66 Ill. 367.
Price vs. Town of Breckenridge, 5 S.W. 20.

Respectfully submitted.

Walker Perry
Wm. Goudy

# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES,

AT

# OCTOBER TERM, 1898.

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## PIERCE *v.* TENNESSEE COAL, IRON AND RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 174. Argued and submitted January 19, 20, 1899. — Decided February 20, 1899.

An agreement in writing between a mining company and a machinist stated that while in its employ he was seriously hurt under circumstances which he claimed, and it denied, made it liable to him in damages; that six months after the injury, both parties being desirous of settling his claim for damages, the company agreed to pay him regular wages and to furnish him with certain supplies while he was disabled, and carried out that agreement for six months, at the end of which, after he had resumed work, it was agreed that the company should give him such work as he could do, and pay him wages as before his injury, and this agreement was kept by both parties for a year; and then, in lieu of the previous agreements, a new agreement was made that his wages "from this date" should be a certain sum monthly, and he should receive certain supplies, and he on his part released the company from all liability for his injury, and agreed that this should be a full settlement of all his claims against the company. *Held*, that the last agreement was not terminable at the end of any month at the pleasure of the company, but bound it to pay him the wages stipulated, and to furnish him the supplies agreed, so long as his disability to do full work continued; and that, if the company discharged him from its service without cause, he was entitled to

Statement of the Case.

elect to treat the contract as absolutely and finally broken by the company, and, in an action against it upon the contract, to introduce evidence of his age, health and expectancy of life, and, if his disability was permanent, to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, deducting however any sum that he might have earned already or might thereafter earn, as well as the amount of any loss that the defendant sustained by the loss of his services without its fault.

This was an action brought January 22, 1892, in the circuit court of Jefferson County in the State of Alabama, by Frank H. Pierce, a citizen of the State of Alabama, against the Tennessee Coal, Iron and Railroad Company, a corporation of the State of Tennessee, doing business in the State of Alabama, upon a written contract, signed by the parties, and in the following terms:

"Pratt Mines, Ala. 4th June, 1890. Whereas I, F. H. Pierce, while in the employ of the Tennessee Iron, Coal and Railroad Company, Pratt Mines Division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine known as Slope No. 2, and operated by the Tennessee Coal, Iron and Railroad Company, under circumstances which I claim render the said company liable to me for damages; but whereas they disclaim any liability for said accident or the injuries to me resulting from same; and both parties being desirous of settling and compromising said matter; and whereas the said Tennessee Coal, Iron and Railroad Company did make me a proposition on the —— day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such supplies from the commissary at No. 2 prison, as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling, and the benefit of the convict garden at No. 2; and whereas said proposition was accepted by me, and carried out by the said company; and whereas in May, 1889, after I had resumed work, a further proposition was made to me to give me work, such as I could do, paying me therefor the wages paid me before said accident, that is, $60 per month, and in addition free house rent, [or in lieu of

house rent a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid by me for house rent;] and whereas said agreement has been faithfully kept by both parties; and whereas on the 4th day of June, 1890, it is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary; now therefore it is agreed, in view of the above propositions, which have been faithfully carried out, that my wages from this date are to be $65 a month, and in addition I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege; and I on my part agree and bind myself to release the said company from any and all liability for said accident, or from the injuries resulting to me from it or from the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company."

The complaint set out the contract, except the clause above printed in brackets; and alleged that by this contract the defendant became liable to pay the plaintiff monthly during his life the wages therein stipulated, and to furnish him with coal and wood and allow him the privilege of the garden, as therein agreed; that the plaintiff had always been ready and offered to do for the defendant such work given to him as he was able to do, and had labored at the same for such reasonable time as he was able to work and bound to work under this contract; that by the injuries received by him from the accident mentioned therein he was permanently disabled in the use of his legs and hands, and otherwise so injured as to be incapacitated to do more work than he had done and had offered to do; but that the defendant, without any reasonable ground for so doing, abandoned the contract and refused to carry it out, claiming that the defendant was under no obligation to pay to the plaintiff the wages therein stipulated longer than suited its pleasure; and had wholly and purposely disregarded and refused to abide by the obligations of the contract

for the period of six months next before the commencemer of the suit, and had entirely abandoned the contract and di charged the plaintiff from its service. The plaintiff claime damages, in the sum of $50,000, for the defendant's breac and abandonment of the contract.

The defendant demurred to the complaint, upon the groun that the contract set out therein was one of hiring, terminabl at the will of either party, and not one of hiring for life, a alleged in the complaint; and that it appeared, from the obl gations of the complaint, that the defendant, in terminatin the contract of hiring, had only exercised its legal right unde the contract. The court sustained the demurrer, and, th plaintiff declining to amend his complaint, rendered judgmen for the defendant; and the plaintiff on February 21, 1894, ap pealed from that judgment to the Supreme Court of Alabama

The record transmitted to this court does not show any fu ther proceedings in the Supreme Court of Alabama. But th official reports of its decisions show that at November term 1895, it reversed that judgment, and remanded the case to th county court. *Pierce* v. *Tennessee Coal Co.*, 110 Alabama 533. And the record before this court necessarily implie that fact, by setting forth that in March, 1896, on motion o the defendant, suggesting that from prejudice and local influ ence it would not be able to obtain justice in the state courts the case was removed from the county court into the Circui Court of the United States for the Southern Division of th Northern District of Alabama; and a motion to remand th case to the state court was made by the plaintiff (on wha ground did not appear in the record) and was overruled.

In the Circuit Court of the United States, on January 4 1897, the following proceedings took place: The demurrer t the complaint was renewed by the defendant, and overrule by the court. The plaintiff then amended his complaint b inserting, in the copy of the contract set forth therein, th words above printed in brackets; and a demurrer to th amended complaint was filed and overruled. In answer t this complaint the defendant filed two pleas: 1st. A denia of each and every allegation of the complaint; 2d. "The de

fendant, for further answer to the complaint, says that the plaintiff, under and by the terms of the contract set out in the complaint, contracted to perform for the defendant during the term thereof such service as he was able to perform, in consideration for the promises made by the defendant therein; and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter, and that, while engaged in the performance of such service, the plaintiff voluntarily and without excuse therefor refused to further perform such service as he was able to perform and was in fact performing for the defendant, as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract." The plaintiff joined issue on the first plea; and demurred to the second plea, upon the ground that it did not go to the whole consideration of the contract, and was no answer to the entire action; and the court sustained his demurrer. The defendant, for further answer, and by way of recoupment, pleaded that on May 3, 1891, the plaintiff, voluntarily and without excuse, refused to perform such labor as he was able to perform and was in fact performing for the defendant, as required by the contract; and since that time had continued to refuse to perform and had not in fact performed such service, or any part thereof; to the damage of the defendant in the sum of $50,000.

A bill of exceptions, tendered by the plaintiff and allowed by the court, showed that at the trial before the jury the following proceedings were had:

The plaintiff introduced and read in evidence the contract sued on, and introduced evidence tending to prove the allegations of the complaint. He also offered evidence that, at the time of his discharge by the defendant from its employment in May, 1891, he was fifty-five years of age, and that he was then and had since been in good health, and addicted to no habits of drinking or otherwise, affecting his health and expectancy of life; and introduced the American tables of mortality

used by insurance companies, showing his expectancy of life at the time of his discharge, and at the time of the trial.

But the court ruled that no recovery could be allowed on the contract, beyond the instalments of wages due and in default up to the date of the trial; and, upon the defendant's motion, excluded all evidence of the plaintiff's age, health and expectancy of life, "on the ground that it was immaterial and irrelevant, and because damages for the expectancy of life was a matter too vague and uncertain to be allowed."

The plaintiff duly excepted to the ruling and to the exclusion of evidence; and, to present the same point, asked the court to give, and duly excepted to its refusal to give, the following instruction to the jury: "If the defendant, after making the contract sued on, and before the suit, refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff, and discharged him, the plaintiff is entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future, and may have been able heretofore to earn, and less such loss as the defendant may have sustained from the loss of the plaintiff's service without the defendant's fault."

The defendant also tendered and was allowed a bill of exceptions, presenting substantially, though in different form, the questions involved in the plaintiff's case, and the contents of which therefore need not be particularly stated.

The jury returned a verdict for the plaintiff in the sum of $5893, upon which judgment was rendered. Each party sued out a writ of error from the Circuit Court of Appeals for the Fifth Circuit.

That court was of opinion that the contract sued on was for "an employment by the month, and therefore, like every other such employment, subject to be discontinued, at the will of either party, at the expiration of any month, or at any time for adequate cause;" and consequently that there was error

in overruling the demurrer to the complaint; and upon that ground, without passing upon any other question in the case, reversed the judgment of the Circuit Court of the United States, and remanded the case to that court for further proceedings, Judge Pardee dissenting. 52 U. S. App. 355, 365. The plaintiff thereupon applied for and obtained a writ of certiorari from this court. 168 U. S. 709.

*Mr. Walker Percy* for the Tennessee Coal, Iron and Railroad Company. *Mr. William I. Grubb* was on his brief.

*Mr. W. A. Gunter*, for Pierce, submitted on his brief.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

In the Circuit Court of the United States, a verdict and judgment were rendered for the plaintiff for a less amount of damages than he claimed; and each party alleged exceptions to rulings and instructions of the judge, and sued out a writ of error from the Circuit Court of Appeals. That court held that the defendant's demurrer to the complaint should have been sustained, and therefore reversed the judgment of the Circuit Court, and remanded the case for further proceedings. A writ of certiorari to review the judgment of the Circuit Court of Appeals was thereupon applied for by the plaintiff, and was granted by this court.

The fundamental question in this case is whether the contract in suit, made by the parties on June 4, 1890, is a contract intended to last during the plaintiff's life, or is a mere contract of hiring from month to month, terminable at the pleasure of either party at the end of any month.

The facts bearing upon this question, as appearing upon the face of this contract, are as follows: In May, 1888, the plaintiff, while employed as a machinist in the defendant's coal mine in Alabama, was seriously hurt by a trip of tram cars on the main slope of the mine, under circumstances which the plaintiff claimed, and the defendant denied, rendered it liable to him in damages. The parties were desirous of settling and

compromising the plaintiff's claim for damages for the injuries, and had repeated negotiations with that object. In November, 1888, they made an agreement (which does not appear to have been reduced to writing) by which the defendant was to pay the plaintiff regular wages while he was disabled, and also to furnish him with such supplies as he might choose to get from a commissary, and to give him coal and wood for fuel at his dwelling house, and the benefit of a garden belonging to the defendant. The agreement was carried out by the defendant until May, 1889, and was then, after the plaintiff had resumed work, modified by stipulating that the defendant should give the plaintiff such work as he could do, should pay him therefor wages of $60 a month, as before the accident, and should give him the rent of his house, or, in lieu of house rent, an equivalent amount of supplies from the commissary; and the agreement, as so modified, was faithfully kept by both parties until June 4, 1890. Finally, on that day, the parties entered into the written contract sued on, by which, after reciting the plaintiff's claim for damages and the earlier agreements, it was agreed "in view [evidently a misprint for "in lieu"] of the above propositions, which have been faithfully carried out," that the plaintiff's "wages from this date are to be $65 a month," (the increase of wages being apparently intended as an equivalent for the provision, now omitted, for house rent or supplies from the commissary,) and that he was to have, free of charge, his fuel and the benefit of the garden; and the plaintiff, on his part, agreed to release the defendant from any and all liability for the accident, or for the injuries resulting to him from it or from the effects of it, and that this should be a full and satisfactory settlement of all claims which he might have against the defendant.

The effect of the provisions and recitals of the contract sued on may be summed up thus: The successive agreements between the parties were all made with a view to settle and compromise the plaintiff's claim against the defendant for personal injuries, caused to him by the defendant's cars while he was in its service as a machinist, and seriously impairing his ability to work. By each agreement, the defendant was

to pay him certain wages, and to furnish him with certain supplies. The supplies to be furnished were evidently a minor consideration, and require no particular discussion. The more important matter is the wages. The defendant, at first, agreed to pay the plaintiff "regular wages while he was disabled." The agreement, in that form, would clearly last so long as he continued to be disabled, and could not have been put an end to by the defendant without the plaintiff's consent. By the next succeeding agreement, made after the plaintiff had resumed work, the defendant was "to give him work, such as he could do, paying him therefor the wages paid before said accident, that is, $60 a month." That agreement must be considered as a mere modification of the first, requiring the plaintiff to do such work as he could do, but showing that he was still much disabled by his injuries. By the final agreement in writing of June 4, 1890, after reciting the plaintiff's claim for damages for these injuries, as well as the earlier agreements, his wages were increased by a stipulation that his "wages from this date are to be $65 a month," and he expressly released the defendant from all liability for the injuries resulting to him from the accident or from the effects thereof, and agreed that this should be a full and satisfactory settlement of all his claims against the defendant.

The only reasonable interpretation of this contract is that the defendant promised to pay the plaintiff wages at the rate of $65 a month, and to allow him his fuel and the benefit of the garden so long as his disability to do full work continued; and that, in consideration of these promises of the defendant, the plaintiff agreed to do such work as he could, and to release the defendant from all liability upon his claim for damages for his personal injuries. An intention of the parties that, while the plaintiff absolutely released the defendant from that claim, the defendant might at its own will and pleasure cease to perform all the obligations which were the consideration of that release, finds no support in the terms of the contract, and is too unlikely to be presumed. *Carnig* v. *Carr*, 167 Mass. 544, 547.

The Supreme Court of Alabama, when the case at bar was before it on appeal from the county court, and before the removal of the case into the Circuit Court of the United States, expressed the opinion that "the contract is sufficiently definite as to time, and bound the defendant to its performance, so long as the plaintiff should be disabled by reason of the injuries he received, which, under the averment that he was permanently disabled, will be for life;" and upon that ground reversed the judgment of the county court sustaining the demurrer to the complaint, and remanded the case to that court. 110 Alabama, 533, 536. As we concur in that opinion, it is unnecessary to consider how far it should be considered as binding upon us in this case. See *Williams* v. *Conger*, 125 U. S. 397, 418; *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349; *Great Western Tel. Co.* v. *Burnham*, 162 U. S. 339, 344, and cases cited; *Moulton* v. *Reid*, 54 Alabama, 320.

It follows that the judgment of the United States Circuit Court of Appeals in this case was erroneous, and must be reversed.

It appears to us to be equally clear that the Circuit Court of the United States erred in excluding the evidence offered by the plaintiff, in restricting his damages to the wages due and unpaid at the time of the trial, and in declining to instruct the jury as he requested.

Upon this point, the authorities are somewhat conflicting; and there is little to be found in the decisions of this court, having any bearing upon it, beyond the affirmance of the general propositions that "in an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant," and, "in order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the

probable duration of life, and the present value of a life annuity, are competent evidence;" *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545, 554; and that in an action for breach of contract "the amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken." *Benjamin* v. *Hilliard*, 23 How. 149, 167.

But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears by well considered opinions in cases of agreements to furnish support or to pay wages, a few only of which need be referred to.

In *Parker* v. *Russell*, 133 Mass. 74, the declaration alleged that, in consideration of a conveyance by the plaintiff to the defendant of certain real estate, the defendant agreed to support him during his natural life; and that the defendant accepted the conveyance, and occupied the real estate, but neglected and refused to perform the agreement. The plaintiff proved the contract; and introduced evidence that the defendant did support him in the defendant's house for five years, and until the house was destroyed by fire, and had since furnished him no aid or support. The jury were instructed that "if the defendant, for a period of about two years, neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support, and full indemnity for his future support." Exceptions taken by the defendant to this instruction were overruled by the Supreme Judicial Court of Massachusetts. Mr. Justice Field, in delivering judgment, said: "In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the

date of the writ, and not up to the time when the verdict is rendered. But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he so elects to treat it, the damages are assessed as of a total breach of an entire contract. Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract, they include damages for not performing the contract in the future, as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite, because the duration of the life of the plaintiff is uncertain; but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life. When the defendant, for example, absolutely refuses to perform such a contract, after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready, at all times during his life, to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death. *Daniels* v. *Newton*, 114 Mass. 530, decides that an absolute refusal to perform a contract, before the performance is due by the terms of the contract, is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract, after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." 133 Mass. 75, 76. It is proper to remark that the point decided in *Daniels* v. *Newton* was left open in *Dingley* v. *Oler*, 117 U. S. 490, 503, and has never been brought into judgment in this court.

So in *Schell* v. *Plumb*, 55 N. Y. 592, the action was by a woman, for a breach of an oral contract, by which the defendant's testator agreed to support the plaintiff during her life, and she agreed to render what services she could towards paying for her support. The contract was carried out for some years; and the defendant then turned her away, and refused to support her. At the trial the judge, against the defendant's objection, admitted in evidence the Northampton tables of life annuities, to show the probabilities of life at the plaintiff's age; and instructed the jury that, if the plaintiff was turned out in violation of the contract, without any misconduct on her part, she was entitled to recover damages from the breach of the contract to the time of trial, deducting what wages she might have earned during that time; and also to recover for her future support and maintenance, as to which the jury were instructed as follows: "Your verdict is all she can ever recover, no matter how long she may live. That ends the contract between these parties; and you will decide, considering her age, her health, her condition in life, and the circumstances under which she is placed, how long she will probably live, and how much services she can probably perform in the future, and say how much more it will cost her to support herself than she will be able to earn, and allow her to recover for such sum." The verdict was for the plaintiff, and judgment was rendered thereon. The defendant appealed, contending that, if the plaintiff was entitled to recover at all, she could only recover for the time prior to the commencement of the action, or, at most, to the time of trial; and that, as to the future, it was impossible to ascertain the damages, as the duration of life was uncertain, and a further uncertainty arose from the future physical condition of the person. But the Court of Appeals, in an opinion delivered by Judge Grover, affirmed the judgment, saying: "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract." "It may be

further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain, notwithstanding the uncertainty of the duration of his life and other contingencies which may possibly affect the amount." 55 N. Y. 597, 598. See also *Remelee* v. *Hall*, 31 Vermont, 582; *Sutherland* v. *Wyer*, 67 Maine, 64.

In *Eastern Tennessee &c. Railroad* v. *Staub*, 7 Lea, 397, the facts were singularly like those in the case at bar. The plaintiff, having, while in the employ of the defendant railroad company as an engineer, and in the discharge of his duties as such, received serious injuries by a collision between his locomotive engine and another train, and having brought an action to recover damages for those injuries, an agreement, by way of compromise, was entered into, by which, in consideration of the plaintiff's agreeing to dismiss his suit, the defendant agreed to pay the costs thereof and the plaintiff's attorney's fee and physician's bills; and further agreed to retain him in its employ, the plaintiff working when, in his own opinion, he was able to do so, and performing only such services as in his disabled condition he might be able to perform; the defendant agreed to pay him a certain specified sum per day, regular wages paid to machinists, whether he labored or not; and the contract was to continue as long as the injuries should last. For some time after this agreement, the plaintiff continued, at intervals, to perform light work for the defendant, receiving pay, however, only for the time he actually worked; and the defendant then denied any liability under the agreement, and refused to allow the plaintiff to continue the service under it. The Supreme Court of Tennessee held that the plaintiff was entitled to recover in one action the entire damages, not only for wages already due and unpaid, but also damages to the extent of the benefit that he would probably have realized under the contract; and, speaking by Judge McFarland, said: "It is a mistake to suppose, as has been done in argument, that because, in estimating the damages, we look to the probable course of events after the suit is brought, we are therefore allowing damages that accrue after the action is

brought. The right to recover damages accrues upon the breach of the contract. But the rule of damages in such cases is what would have come to the plaintiff under the contract had it continued, less whatever the plaintiff might earn by the exercise of reasonable and proper diligence on his part; and, of course, in ascertaining this, we must look to a time subsequent to the breach, and in some cases to a time subsequent to the bringing of the suit. Nor is it any objection to the recovery, that in this case the damages are difficult to ascertain, depending upon contingent and uncertain events. There are many cases in which the damages are uncertain and difficult to ascertain, and, in fact, cannot be ascertained with certainty, but this has never been regarded as a sufficient reason for denying all relief." 7 Lea, 406.

These cases appear to this court to rest upon sound principles, and to afford correct rules for the assessment of the plaintiff's damages in the case at bar.

The legal effect of the contract sued on, as has been seen, was that the defendant promised to pay the plaintiff certain wages, and to furnish him with certain supplies, so long, at least, as his disability to work should continue; and the consideration of these promises of the defendant was the plaintiff's agreement to do for the defendant such work as he was able to do, and his release of the defendant from all liability in damages for the personal injuries which had caused his disability.

The complaint alleged, and the plaintiff at the trial introduced evidence tending to prove, that by those injuries he was permanently disabled; that he was always ready and offered to do for the defendant such work as he was able to do, and labored at that work for such reasonable time as he was able to work and bound to work under the contract; and that the defendant, without any reasonable ground therefor, denied its obligation to pay the plaintiff the stipulated wages longer than suited its pleasure, and, for six months before the commencement of the action, disregarded the contract, and refused to abide by it, and entirely abandoned the contract, and dismissed the plaintiff from its services.

If these facts were proved to the satisfaction of the jury, the case would stand thus: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on.

In assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future, as well as the amount of any loss that the defendant had sustained by the loss of the plaintiff's services without the defendant's fault. And such deduction was provided for in the instruction asked by the plaintiff and refused by the judge.

The questions of law presented by the defendant's bill of exceptions, allowed by the Circuit Court of the United States, are substantially like those above considered, and require no further notice.

The result is, that the judgment of the Circuit Court of Appeals, sustaining the demurrer to the complaint, and reversing the judgment of the Circuit Court of the United States, must be reversed; that the judgment of the Circuit Court of the

United States must also be reversed, because of the ruling excepted to by the plaintiff; and that the case must be remanded to that court, with directions to set aside the verdict and to order a new trial.

*Judgments of the Circuit Court of Appeals and of the Circuit Court of the United States reversed, and case remanded to said Circuit Court for further proceedings in conformity with the opinion of this court.*